In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

PERCY GREEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,

Plaintiff,

vs.

McDonnell Douglas Corporation, a Corporation (Formerly Known as McDonnell Aircraft Corporation),

Defendant.

Cause No. 68C 187(2).

DOCKET ENTRIES

Date	Proceedings
1968	
Apr. 15	Complaint filed and summons issued.
July 3	Answer filed.
Sept. 10	Plff's interrogatories to deft, filed.
	Plff's request for admissions, filed.
Oct. 18	Answers of deft McDonnell-Douglas Corp to interrogatories filed.
	Answers in part of said deft and objection to plff's request for admissions filed.
Oct. 24	Plff's interrogatories (set No. 2) filed.
Oct. 29	Above objections and file to Judge Meredith.

Nov. 13 Deft's objections to plff's interrogatories (Set No. 2) filed. Argument requested.

Dec. 13 Deft's objections to plff's interrogatories, Set No. 2, argued and submitted.

Dec. 31 Order filed sustaining deft's objections to plff's Interrogatories (Set No. 2).

1969

Jan. 13 Motion of plff for production of documents for inspection, copying or photographing filed.

Jan. 21 Deft's objections to plff's motion for production of documents for inspection, copying or photographing, filed. Argument requested.

Feb. 14 Plff's motion for production of documents for inspection, copying or photographing and deft's objections to said motion, argued and submitted. Order filed sustaining deft's objections to plff's motion for production of documents as to Paragraphs 1 through 11 and 19 through 21 and overruling as to Paragraphs 12 through 18 except that these requirements are limited to the month of July 1965.

Mar. 20 Plff's amended complaint filed by leave.

Mar. 21 Motions of deft to strike and to dismiss for failure to state a claim upon which relief can be granted filed. Argument requested.

Apr. 11 Deft's motions to strike and to dismiss for failure to state a claim upon which relief can be granted argued and submitted.

May 13 Memorandum Opinion filed. Order filed granting motion of deft to strike and dismiss certain por-

tions of plff's amended complaint alleging employment discrimination against plff for the reason of race and striking same.

June 23 Motion of deft to quash Notice to take Depositions and Subpoenas filed. Argument requested.

July 30 Memorandum and order on motion of deft to quash certain of plff's notices to take depositions, filed.

Memorandum incorporated in and made a part of order. Motion of deft granted and notices to take depos. of Robert C. Krone and James S. McDonnell quashed, on condition that officer or managing agent of deft appear & have his deposition taken within ten days. Subpoena directed to Ivan Rutherford directing him to produce security records of plff quashed.

1970

Jan. 12 Parties appear by their respective counsel and announce ready for trial. Evidence on behalf of plff. on trial of cause before the Court commenced. Further proceedings on trial postponed until tomorrow at 10 A.M.

Jan. 13 Again come the parties; whereupon the introduction of evidence on behalf of plff on trial of cause before the Ct. is resumed, and concluded. Oral motion of deft. for judgment in its favor made at close of plff's case and ruling thereon reserved by the Court. Evidence on behalf of deft. commenced but not concluded. Deft. granted one week after conclusion of this hearing in which to submit an additional exhibit.

Further proceedings of trial postponed until tomorrow at 10 A.M.

Jan. 14 Again come the parties; whereupon the introduction of evidence on behalf of deft. is resumed but not concluded and further proceedings on trial postponed until tomorrow at 10 A.M.

Jan. 15 Again come the parties; whereupon the introduction of evidence on behalf of deft. is resumed and concluded. Evidence on behalf of plff. in rebuttal is commenced and concluded.

Plff. granted 30 days after filing of transcript by Ct. Reporter in which to submit proposed findings of fact, conclusions of law and brief. Deft. granted 30 days thereafter to file its proposed findings of fact, conclusions of law and answering brief.

Plff. granted 15 days thereafter to respond cause to be submitted after receipt of final brief.

Aug. 24 Plff's request to amend his complaint by interlineation in accordance with memo. filed, presented and denied.

Sept. 25 Memorandum Opinion filed. Judgment filed and entered incorporating and making such Memorandum a part of this judgment, granting judgment to the defendant and dismissing plff's complaint with prejudice, the costs herein to be paid by plff.

Oct. 5 Plff's Notice of Appeal from order of May 13, 1969, striking from amended complaint allegations of employment discriminating against plff. for reason of race and from final judgment entered in this cause on Sept. 25, 1970, granting judgment to deft. and dismissing plff's complaint with prejudice and assessing costs against plff., filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Percy Green, Appellant,

v.

McDonnell Douglas Corporation, Appellee.

No. 20,596.

1970

Oct. 9 Docketed on Appeal from the Eastern District of Missouri.

1971

Apr. 15 Argued and submitted to Judges Johnsen, Lay and Bright. Arg. com. by Louis Gilden for aplnt; cont. by Gaylord C. Burke for aplee; concl. by Gilden.

1972

Mar. 30 Majority opinion by J. Bright; Concurring opinion by J. Lay; Dissenting opinion by J. Johnsen.

Mar. 30 Judgment: Judgment of D.Ct. reversed. Cause remanded to D.Ct. for proceedings consistent with opinion.

Apr. 12 Petition of appellee for rehearing en banc.

May 12 Order on Petition of appellee for rehearing en banc, with modification of majority opinion and suppl. dissenting opinion to dissenting opinion filed Mar. 30, 1972 attached. Petition denied.

May 22 Mandate issued.

May 24 Order: Mandate recalled; Clerk of D.Ct. to return same to this Ct. Aplee gr to June 2 to file pet. for rehr.

May 25 Mandate returned from D. Ct.

June 2 Appellee's Renewed Petition for Rehearing En Banc.

June 28 Order: Renewed pet. for rehearing en banc denied by evenly divided Court. Pet. for reh denied with J. Johnsen dissenting.

July 7 Order: Aplee's mtn for stay of mandate pending pet. for certiorari gr for period of 90 days from June 28. Stay to continue if cert. gr.

Oct. 6 Statement of counsel for appellant for atty. fees.

Oct. 13 Response of appellee to applt's request for allowance of atty's fees.

Nov. 2 Order: Louis Gilden awarded fee of $1,750 to be taxed against appellee. Judge Johnsen dissents from award of fee.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

COMPLAINT UNDER EQUAL EMPLOYMENT OPPORTUNITY ACT

(Filed April 15, 1968)

Comes now the plaintiff and states:

1. That the defendant is and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of law.

2. That said defendant is a person engaged in industry affecting commerce, having one hundred employees or more in each of twenty or more calendar weeks and that the defendant's principal place of business is located in St. Louis County, within this district.

3. That on or about the 14th day of September, 1965, plaintiff filed a complaint with the Equal Employment Opportunity Commission of the United States under 42 U.S.C.A., Sec. 2000 in which he alleged that he was discriminated against for employment by the defendant for the reasons of race and because of his involvement in the Civil Rights movement. That a copy of said complaint is attached hereto and made a part hereof and marked Plaintiff's Exhibit "A".

4. That thereafter, the Equal Employment Opportunity Commission of the United States deferred said complaint to the Missouri Commission on Human Rights in accordance with the aforestated Act.

5. That the deferral period for the Missouri Commission on Human Rights to seek relief for the plaintiff expired, and thereafter the Equal Employment Opportunity Commission of the United States commenced its proceedings and its investigation of the facts alleged in plaintiff's complaint before it. That said Commission instituted its proceedings pursuant to a request of the plaintiff filed with the Equal Employment Opportunity Commission of the United States within two hundred ten days after the unlawful employment practice occurred, to-wit: July 26, 1965, and thereafter. That the jurisdiction was requested on copy of letter dated January 21, 1966, from the Equal Employment Opportunity Commission, and said letter is marked Plaintiff's Exhibit "B" and is made a part hereof.

6. That thereafter the Equal Employment Opportunity Commission of the United States undertook its investiga-

tion and review of plaintiff's case, and on the 8th day of May, 1967, rendered its decision that reasonable cause exists to believe that defendant violated Section 704(a) of the Civil Rights Act of 1964 by refusing to accept the plaintiff for employment because of his involvement in civil rights activities. The decision of the Equal Employment Opportunity Commission is attached hereto and made a part hereof and marked Plaintiff's Exhibit "C". That plaintiff was further notified by the Commission of the findings on June 8, 1967, by letter which is attached hereto and made a part hereof and marked Plaintiff's Exhibit "D".

7. That thereafter on March 19, 1968, plaintiff was notified by the Equal Employment Opportunity Commission of the United States that conciliation efforts with defendant had failed to achieve voluntary compliance by the defendant under the law, and that plaintiff may institute a civil action in the Federal District Court; that a copy of said notice of right to sue within thirty days is attached hereto and made a part hereof, and marked Plaintiff's Exhibit "E".

8. That the defendant has intentionally engaged in an unlawful employment practice in that said defendant has discriminated against plaintiff by denying him employment because he has opposed practices made an unlawful employment practice by the law, and that plaintiff has been denied employment because of his involvement in civil rights activities.

9. That the plaintiff has lost wages by reason of the unlawful employment practices of the defendant, and plaintiff has also earned less money in other employment than he would have earned had he been employed by this defendant.

Wherefore, plaintiff prays that this Court find that the defendant has intentionally engaged in an unlawful em-

ployment practice by having denied the plaintiff employment because he has opposed practices made an unlawful employment practice by the law governing equal employment opportunities; that the Court further enjoin defendant from engaging in this unlawful employment practice that this Court further order the defendant to hire plaintiff in the position for which he applied for employment and that the defendant be ordered to pay to plaintiff all lost back pay, because of said unlawful employment practice; that the defendant be ordered to pay plaintiff's attorney reasonable attorney's fees in accordance with the law, and that said attorney's fees be assessed against defendant as costs in this action; and further, that the defendant be ordered to pay all costs in this action.

/s/ Percy H. Green

(Affidavit omitted in printing)

/s/ Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63101
CHestnut 1-6607

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ANSWER

(Filed July 3, 1968)

Comes now defendant McDonnell Douglas Corporation and for its answer to the complaint filed herein states to the Court as follows:

1. Defendant admits the allegations in paragraph 1 of the complaint.

2. Defendant admits the allegations in paragraph 2 of the complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the complaint except defendant admits that plaintiff filed a charge against defendant with the Equal Employment Opportunity Commission under Title 42, U.S.C.A., Section 2000e-5, alleging plaintiff "was discriminated against for employment by the defendant for the reasons of race and because of his involvement in the civil rights movement."

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 of the complaint.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the complaint, except defendant admits that on or about March 19, 1968, plaintiff was notified by the office of the Equal Employment Opportunity Commission that plaintiff may institute civil action in the Federal District Court in accordance with Section 2000e-5(e), Title 42, U.S.C.A.

8. Defendant denies the allegations in paragraph 8 of the complaint.

9. Defendant denies the allegation that plaintiff has lost wages by reason of the unlawful employment practices of the defendant and further defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff has also earned less money in other employment than he would have earned had he been employed by defendant.

Wherefore, having fully answered, defendant prays that it be dismissed from this action with its costs.

/s/ Gaylord C. Burke
Edward T. Foote
Attorneys for Defendant
1600 Boatmen's Bank Building
314 North Broadway
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CHestnut 1-6646

Bryan, Cave, McPheeters & McRoberts
Of Counsel

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

PLAINTIFF'S INTERROGATORIES, SET NO. 2

(Filed October 24, 1968)

Comes now the plaintiff and propounds the following interrogatories under Rule 33 of the Rules of Civil Procedure:

1. State the monthly number of the total work force employed by your company in its St. Louis City-St. Louis County facilities from January 1, 1961, to date.

2. State whether these employees are divided into job classifications, and if so, state the classifications and the basis for such classifications.

3. State separately the monthly number of whites and non-whites holding each of the classifications set forth in response to interrogatory No. 2 from January 1, 1961, to date.

4. State separately the monthly number of white and non-white persons hired to fill jobs in each classification mentioned in interrogatory No. 2 from January 1, 1961, to date.

5. State separately the monthly number of whites and non-whites transferred from one classification to another from January 1, 1961, to date.

6. State the criteria by which eligibility for transfer from one classification to another is determined.

7. State separately the monthly number of whites and non-whites who applied for transfers from one classification to another from January 1, 1961, to date.

8. State whether or not your St. Louis City-St. Louis County facilities maintain any line of progression, and if so, further state:

a. The name and structure of each line of progression in effect as of January 1, 1961, and modifications or additions affected at one year intervals thereafter to date.

b. State the pattern of movement from one job to another in each line according to "i" seniority and "ii" race, from January 1, 1961, to date.

9. State the seniority system or measure and any other standard including those relating to qualifications, that is currently applied to determine or select the employee that will be promoted to a vacancy above the entry level of a line of progression, and if such standards vary from those imposed as of January 1, 1961, state:

a. The differing provisions in effect as of January 1, 1961, and January 1, 1964.

b. The reasons any changes were effected.

10. State separately the seniority of white and non-white employees in each classification mentioned in interrogatory No. 2 and in each line of progression mentioned in interrogatory No. 6.

11. Describe all the requirements for initial employment at the St. Louis City-St. Louis County facilities, including requirements that the applicant pass an oral examination or written test; further state:

a. If written tests are required, the jobs and/or lines of progression for which a written test is required; in addition, state

i) The applicants who are required to pass a written test as a condition of transfer or employment;

ii) The applicants who are exempt from such written tests;

iii) The weight given to the scores of such a written test in the decisions to hire or transfer.

b. If oral tests or interviews are required, the job and/or lines of progression for which such test or interview is required; in addition state

i) The applicants who are required to submit to such a test or interview and the criteria by which the applicant is rated;

ii) The applicants who are exempt from such a test or interview;

iii) The purpose of such test or interview;

iv) The weight given to the rating resulting from such an interview or test in the decision to hire or transfer.

12. State separately the monthly numbers of white and non-white applicants who the company has refused to hire or transfer from January 1, 1961, to date; and further state separately,

a. The number of whites and non-whites who were refused employment or transfer because of failure to meet the standards ruling the written test.

b. The number of whites and non-whites who were refused employment or transfer because of an interview or oral test.

13. Attach copies or identify specifically the documents in which the tests and standards described in interrogatories No. 11 and No. 12 are contained.

/s/ Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63101
CHestnut 1-6607

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORIES, SET NUMBER TWO

(Filed November 13, 1968)

Defendant McDonnell Douglas Corporation objects to Plaintiff's interrogatories, set number 2, numbers 1 through 13, including all sub-paragraphs, on the following grounds:

1. The interrogatories on their face are irrelevant to the issues raised by the pleadings. In particular:

(a) Interrogatories 1 through 5, 7, 8 (a) and (b), 9 (a) and (b), 10 and 12 (a) and (b) concern a period nearly eight years long, from January 1, 1961 to date; whereas, the pleadings raise issues concerning only one incident of alleged discrimination, on July 26, 1965.

(b) Interrogatories 1 through 4 concern all employees at Defendant's plant for an eight year period; whereas, the issues in this case concern only one employee on one day.

(c) The pleadings raise no issues whatever of transfers from one classification to another; whereas, interrogatories 5, 6 and 7 demand information about all "transfers" since January 1, 1961, and the "criteria by which eligibility for transfer" is determined.

(d) The pleadings raise no issues about any "line of progression;" whereas, interrogatories 8 through 10, including the sub-paragraphs thereof, demand in-

formation about the "line of progression" since January 1, 1961.

(e) The pleadings raise issues about one man in one job and at one time; whereas, interrogatory 11, including sub-paragraphs thereof, is a blanket demand about requirements for all jobs at Defendant's plant.

(f) The pleadings raise issues about one man and his qualifications for one job at one time; but interrogatory 12 concerns an eight year period and thousands of jobs and applicants, whose qualifications have no conceivable relevance to this proceeding.

2. Answers to these interrogatories would be exceptionally burdensome to prepare, as is shown on the attached Affidavit.

3. None of the interrogatories seeks information which could reasonably be calculated to lead to the discovery of admissible evidence.

Gaylord C. Burke
Edward T. Foote
1600 Boatmen's Bank Building
314 North Broadway
St. Louis, Missouri
Chestnut 1-6646

(Certificate of service omitted in printing)

Affidavit

(Title omitted in printing)

John M. Kozonasky, on his oath, states:

1. I am Supervisor of Personnel Records at St. Louis for McDonnell Douglas Corporation, Defendant in a case

now pending in the United States District Court, Eastern District of Missouri, Eastern Division, Cause No. 68 C 187 (2).

2. I have read Plaintiff's interrogatories, Set No. 2, served on McDonnell Douglas Corporation on October 25, 1968. I have investigated the work which would be necessary to answer these interrogatories.

3. I have determined that since January 1, 1961, Defendant has received over 662,000 applications for employment at its St. Louis location and it has employed over 69,000 new employes there. Over the period from January 1, 1961 to date, there have been approximately 1,400 different job classifications at Defendant's St. Louis plant. In order to answer Plaintiff's interrogatories Defendant would have to review all applications for employment which are still available and would then have to review records of all employees actually employed during this period (over 110,000) in order to distribute them among 1,400 job classifications. In addition, all existing change of status records would have to be reviewed, and these number in the tens of thousands. It is my estimate that it would take three people working a normal forty hour work week approximately three to six months to obtain the information requested in Plaintiff's interrogatories.

/s/ John M. Kozonasky

(Acknowledgment omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ORDER

(Filed December 31, 1968)

This matter is pending on defendant's objections to plaintiff's interrogatories, Set No. 2, being interrogatories 1 through 13. The Court has been advised by oral argument and briefs of the parties, and the objection of the defendant to these interrogatories on the ground that to answer these interrogatories would take three men working from three to six months to obtain the answers will be sustained. This is oppressive to the defendant.

It Is Hereby Ordered that the objection of the defendant be and the same is sustained.

Dated this 31st day of December, 1968.

/s/ James H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS FOR INSPECTION, COPYING OR PHOTOGRAPHING

(Filed January 13, 1969)

Comes now the plaintiff and under Rule 34 moves the Court for an Order upon the defendant to produce and

permit the inspection and copying or photographing of the following designated documents, papers, books, or records which contain evidence which is in the possession of the defendant, and states he has good cause for this Motion in that this Court has heretofore entered an Order sustaining objection by defendant to plaintiff's Interrogatories, Set No. 2, upon the grounds that to answer said interrogatories would be oppressive to defendant; that the information requested in said interrogatories is the same as that covered by this Motion, except that plaintiff would have the burden of obtaining the information from the books and records of the defendant. Said books and records of the defendant are material in that they may contain the evidence that establishes that the defendant violated the law by refusing to accept the plaintiff for employment because of his involvement in civil rights activities and because he has opposed practices of the defendant made an unlawful employment practice by the law.

Plaintiff moves the production of the documents which contain the following information:

1. The monthly number of the total work force employed by defendant in its St. Louis City-St. Louis County facilities from January 1, 1961, to date.

2. How these employees are divided into job classifications and the basis for such classifications.

3. The monthly number of whites and non-whites, males and females, holding each of the classifications set forth in 2 above from January 1, 1961, to date.

4. The monthly number of white and non-white persons, male and female, hired to fill jobs in each classification mentioned in 2 above from January 1, 1961, to date.

5. The monthly number of whites, non-whites, males, and females transferred from one classification to another from January 1, 1961, to date.

6. The criteria by which eligibility for transfer from one classification to another is determined.

7. The monthly number of whites, non-whites, males and females who applied for transfers from one classification to another from January 1, 1961, to date.

8. The line of progression in effect as of January 1, 1961, and modifications or additions affected at one year intervals thereafter to date.

9. The pattern of movement from one job to another in each line according to 1) seniority and 2) race, from January 1, 1961, to date.

10. The seniority system or measure and any other standard including those relating to qualifications that is currently applied to determine or select the employee that will be promoted to a vacancy above the entry level of a line of progression as of this date and as of January 1, 1961.

11. The seniority of white and non-white employees in each classification mentioned in 2 above and in each line of progression mentioned in 6 above.

12. The requirements for initial employment at the St. Louis City-St. Louis County facilities, including requirements that the applicant pass an oral examination or written test.

13. The written tests that are required, including the jobs and/or lines of progression for which a written test is required; in addition,

a. The applicants who are required to pass a written test as a condition of transfer or employment;

b. The applicants who are exempt from such written tests;

c. The weight given to the scores of such a written test in the decisions to hire or transfer.

14. If oral tests or interviews are required, the job and/or lines of progression for which such test or interview is required.

15. The applicants who are required to submit to such a test or interview and the criteria by which the applicant is rated.

16. The applicants who are exempt from such a test or interview.

17. The purpose of such test or interview.

18. The weight given to the rating, resulting from such an interview or test in the decision to hire or transfer.

19. The monthly numbers of white and non-white, male and female applicants who the company has refused to hire or transfer from January 1, 1961, to date.

20. The number of whites, non-whites, males and females who were refused employment or transfer because of failure to meet the standards ruling the written test.

21. The number of whites, non-whites, males, and females who were refused employment or transfer because of an interview or oral test.

/s/ Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63101
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(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS FOR INSPECTION, COPYING OR PHOTOGRAPHING

(Filed January 21, 1969)

Comes now defendant, McDonnell Douglas Corporation, and objects to plaintiff's motion for production of documents, for inspection, copying or photographing on the following grounds:

1. The information sought is identical to that sought in plaintiff's interrogatories, set Number 2, previously filed with the court, to which defendant's objections were sustained.

2. Part of the basis for defendant's objections to those interrogatories was that on their face they were irrelevant to the issues raised by the pleadings. For the same reasons presented in defendant's objections to plaintiff's interrogatories, set Number 2, the information sought and the documents to be inspected under this motion are irrelevant to the issues raised by the pleadings.

3. None of the documents requested in plaintiff's motion could reasonably be calculated to lead to the discovery of admissible evidence.

4. Compliance with this motion would be extremely burdensome and time consuming.

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Bryan, Cave, McPheeters & McRoberts
Of Counsel

Notice

Please take notice that the undersigned will call these objections up for argument in this court on February 14, 1969.

Edward T. Foote

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

ORDER

(Filed February 14, 1969)

This matter is pending on objections to the plaintiff's motion for production of documents sought by the plaintiff. The plaintiff filed a complaint with the Equal Employment Opportunity Commission of the United States under 42 U.S.C. 2000 in which he alleged that he was discriminated against for employment by the defendant "for the reasons of race and because of his involvement in the

Civil Rights movement." The Equal Employment Opportunity Commission found that the alleged violation occurred on July 26, 1965, that the date of filing the complaint was September 14, 1965, and the date of service was August 1, 1966, and in the findings held as follows:

> "Although Respondent denies that Charging Party's involvement in civil rights activities was the reason for rejecting his application for employment, a specific finding of the prior investigative report prepared by the U. S. Navy was that civil rights activity was a factor in Respondent's refusal to accept Charging Party's application."

There is no allegation in the complaint that the reason plaintiff was not employed was because he is a negro.

Plaintiff, in his motion to produce, seeks to elicit from the defendant: the monthly number of total work forces employed by defendant from January 1, 1951, to date; the job classifications and the basis for such classifications; the monthly number of whites and non-whites, males and females, holding each classification from January 1961 to date, plus a breakdown of whites and non-whites for transfers, applications, etc., on a monthly basis from 1961 to date. All of these matters requested by the plaintiff showing employment and the pattern of employment are completely unrelated to the suit in question and they are not calculated to the discovery of any admissible evidence and no good cause has been shown to justify production of some seventy thousand files which would be required under this motion. The Court will require the defendant to furnish to the plaintiff the documents showing the requirements for initial employment, the written tests required, the oral tests or interviews required, those exempt from oral tests or interviews, the purpose of the tests or interviews, the weight given to the rating resulting from such an interview or test, all as set out in the plaintiff's

motion, paragraphs Nos. 12 through 18. This will be limited to the requirements for the month of July 1965. In all other respects the motion will be denied.

It Is Hereby Ordered that the defendant's objections to the plaintiff's motion, paragraphs 1 through 11 and 19 through 21 are sustained.

It Is Further Ordered that the defendant's objections to the plaintiff's motion, paragraphs 12 through 18, are overruled, except that these requirements are limited to the month of July, 1965.

Dated this 14th day of February, 1969.

/s/ James H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

AMENDED COMPLAINT UNDER EQUAL EMPLOYMENT OPPORTUNITY ACT

(Filed March 20, 1969)

Comes now the plaintiff and by leave of Court files this his First Amended Complaint and states:

1. That the defendant is and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of law.

2. That said defendant is a person engaged in industry affecting commerce, having one hundred employees or more in each of twenty or more calendar weeks and that

the defendant's principal place of business is located in St. Louis County, within this district.

3. That on or about the 14th day of September, 1965, plaintiff filed a complaint with the Equal Employment Opportunity Commission of the United States under 42 U.S.C.A., Sec. 2000 in which he alleged that he was discriminated against for employment by the defendant for the reasons of race and because of his involvement in the Civil Rights movement. That a copy of said complaint is attached hereto and made a part hereof and marked Plaintiff's Exhibit A.

4. That thereafter, the Equal Employment Opportunity Commission of the United States deferred said complaint to the Missouri Commission on Human Rights in accordance with the aforestated Act.

5. That the deferral period for the Missouri Commission on Human Rights to seek relief for the plaintiff expired, and thereafter the Equal Employment Opportunity Commission of the United States commenced its proceedings and its investigation of the facts alleged in plaintiff's complaint before it. That said Commission instituted its proceedings pursuant to a request of the plaintiff filed with the Equal Employment Opportunity Commission of the United States within two hundred ten days after the unlawful employment practice occurred, to-wit: July 26, 1965, and thereafter. That the jurisdiction was requested on copy of letter dated January 21, 1966, from the Equal Employment Opportunity Commission, and said letter is marked Plaintiff's Exhibit B and is made a part hereof.

6. That thereafter the Equal Employment Opportunity Commission of the United States undertook its investigation and review of plaintiff's case, and on the 8th day of May, 1967, rendered its decision that reasonable cause exists to believe that defendant violated Section 704(a) of the Civil Rights Act of 1964 by refusing to accept the

plaintiff for employment because of his involvement in civil rights activities. The decision of the Equal Employment Opportunity Commission is attached hereto and made a part hereof and marked Plaintiff's Exhibit C. That plaintiff was further notified by the Commission of the findings on June 8, 1967, by letter which is attached hereto and made a part hereof and marked Plaintiff's Exhibit D.

7. That thereafter on March 19, 1968, plaintiff was notified by the Equal Employment Opportunity Commission of the United States that conciliation efforts with defendant had failed to achieve voluntary compliance by the defendant under the law, and that plaintiff may institute a civil action in the Federal District Court; that a copy of said notice of right to sue within thirty days is attached hereto and made a part hereof, and marked Plaintiff's Exhibit E.

8. That the defendant has intentionally engaged in an unlawful employment practice in that said defendant has discriminated against plaintiff by denying him employment because he has opposed practices made an unlawful employment practice by the law; that plaintiff has been denied employment because of his involvement in civil rights activities; and that he has further been denied employment because of his race and color.

9. That the plaintiff has lost wages by reason of the unlawful employment practices of the defendant, and plaintiff has also earned less money in other employment than he would have earned had he been employed by this defendant.

Wherefore, plaintiff prays that this Court find that the defendant has intentionally engaged in unlawful employment practices by having denied the plaintiff employment because he has opposed practices made an unlawful employment practice by the law; that he has been denied employment because of his involvement in Civil Rights ac-

tivities; and further that he has been discriminated against because the defendant has denied him employment because of his race and color; that the Court further enjoin defendant from engaging in these unlawful employment practices; that this Court further order the defendant to hire plaintiff in the position for which he applied for employment and that the defendant be ordered to pay to plaintiff all lost back pay, because of said unlawful employment practices; that the defendant be ordered to pay plaintiff's attorney reasonable attorney's fees in accordance with the law, and that said attorney's fees be assessed against defendant as costs in this action; and further, that the defendant be ordered to pay all costs in this action.

/s/ Percy Green, Plaintiff
Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63101
CHestnut 1-6607

(Affidavit and certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

DEFENDANT'S MOTIONS TO STRIKE AND TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Filed March 21, 1969)

Defendant McDonnell Douglas Corporation moves this court to strike as impertinent, immaterial and scandalous the following portions of plaintiff's amended complaint:

1. In paragraph 8, the last clause alleging: "[A]nd that he has further been denied employment because of his race and color."

2. In the prayer, the following clause: "[A]nd further that he has been discriminated against because the defendant has denied him employment because of his race and color;"

Defendant McDonnell Douglas Corporation moves this court to dismiss those portions of the complaint quoted above for failure to state a claim upon which relief can be granted, because they are beyond the scope of the findings of the Equal Employment Opportunity Commission, as specifically alleged in paragraph 6 of the amended complaint and attachment D, which is incorporated by reference into the amended complaint.

Gaylord C. Burke
Edward T. Foote
1600 Boatmen's Bank Building
St. Louis, Missouri 63102
CH 1-6646

Bryan, Cave, McPheeters
& McRoberts
Of Counsel

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell-Douglas Corporation, formerly known as McDonnell Aircraft Corporation, a corporation,
Defendant.
No. 68 C 187 (2)

ORDER

(Filed May 13, 1969)

This matter is pending on a motion by the defendant to strike and dismiss certain portions of plaintiff's amended complaint. A memorandum filed this date is hereby incorporated in and made a part of this order. Accordingly,

It Is Hereby Ordered that the motion of the defendant is granted and that portion of the amended complaint alleging employment discrimination against plaintiff for reason of race is stricken.

Dated this 13th day of May, 1969.

/s/ James H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell-Douglas Corporation, Formerly Known as McDonnell Aircraft Corporation, a Corporation,
Defendant.
No. 68 C 187 (2).

MEMORANDUM

(Filed May 13, 1969)

This matter is pending on a motion by the defendant to strike and dismiss certain portions of the plaintiff's amended complaint. The plaintiff filed this action against the defendant, McDonnell-Douglas Corporation, on April 15, 1968, alleging a cause of action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.). A short background of the plaintiff's complaints, as reflected by the pleadings, is necessary to place the present motion in perspective.

The plaintiff alleges that he is a negro who has been active in civil rights activities in the St. Louis area. He applied to McDonnell Aircraft Corporation for a job, and was told that nothing was available at that time. He filed a complaint with the Equal Employment Opportunity Commission, pursuant to 42 U.S.C. 2000e-5, alleging employment discrimination against him for reasons of race

and involvement in civil rights activities. The Equal Employment Opportunity Commission found that reasonable cause existed to believe that the defendant refused to accept the plaintiff for employment because of his involvement in civil rights activities. No finding was made by the Commission as to discrimination due to race. Conciliation failed and the plaintiff was notified on March 19, 1968, that he had thirty days to commence a civil action. The present action was filed on April 15, 1968, alleging violation of Title VII, denial of employment because of involvement in civil rights activities. The amended complaint, filed on March 20, 1969, alleges denial of employment because of civil rights activities and also because of race.

The defendant, in its motion to strike, contends that this Court is without jurisdiction on the issue of discrimination due to race, because the Equal Employment Opportunity Commission did not make a finding of reasonable cause on this ground. The plaintiff contends that this Court has jurisdiction regardless of the finding by the Commission. He contends that the only jurisdictional requirements to commencing a civil suit under Title VII are the filing of a charge with the Commission and the receipt of notification from the Commission.

The enforcement provisions of Title VII of the Civil Rights Act of 1964 are found in 42 U.S.C. 2000e-5:

> "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved . . . that an employer . . . has engaged in an unlawful employment practice, the Commission . . . shall make an investigation of such charge . . . If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such

alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

"(e) If . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . ."

"(f) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter."

The jurisdictional prerequisites to maintaining a suit in the United States district courts under Title VII have been the source of much recent litigation. However, none of these cases considers the question of whether it is necessary for the Equal Employment Opportunity Commission to make a finding of reasonable cause. The cases hold that an individual may not bypass the Commission and go directly to the courts. **Stebbins v. Nationwide Mutual Ins. Co.**, 382 F.2d 267 (4th Cir. 1967). The following have been held to be jurisdictional elements: (1) a charge must be filed with the Equal Employment Commission, and (2) the complainant must receive the statutory notice from the Commission that it has been unable to obtain voluntary compliance. **Dent v. St. Louis-San Francisco Ry.**, 406 F.2d 399 (5th Cir. 1969). **Choate v. Caterpillar Tractor Co.**, 402 F.2d 357 (7th Cir. 1968). **Sokolowski v. Swift and Co.**, 286 F.Supp. 775 (D.Minn. 1968). It has also been held that suit may not be brought against an employer unless he was named in the charge filed with the Commission. **Mickel v. South Carolina State Employment Service**, 377 F.2d 239 (4th Cir. 1967), cert. denied 389 U.S. 877 (1967). The United States District Court for the Central District of California, in **Edwards v. North American Rockwell Corp.**, 291 F.Supp. 199

(1968), dismissed a civil action under Title VII, holding that the court lacked subject-matter jurisdiction over allegations not presented to the Commission in the complaint's charge. It also stated that the "findings of reasonable cause and an attempt to conciliate" by the Commission were not jurisdictional. This latter holding, insofar as it relates to an actual attempt at conciliation, is in line with other decisions. The holding as to a finding of reasonable cause is unique, and is not supported by any reasoning or discussion by that Court. Consequently, it is not very helpful in the present case.

The decisions of courts construing this statute have uniformly held that notice by the Equal Employment Opportunity Commission that it has been unable to effect reconciliation is a jurisdictional prerequisite to civil suit. If there has not been a finding of reasonable cause to believe that the statute had been violated by a specific conduct, there would not have been any occasion for reconciliation. The finding of reasonable cause would of necessity be part of the jurisdictional element of notice that the Commission has been unable to effect reconciliation.

That a finding of reasonable cause by the Commission is necessary for the complainant to maintain a civil suit is supported by comparing House Bill 7152 with the above-quoted provisions of 42 U.S.C. 2000e-5. The present text of Title VII originated as a Senate substitute to the Title VII provisions of House Bill 7152. The House Bill, insofar as it related to enforcement provisions, provided in § 707:

> "(a) . . . If two or more members of the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal

methods of conference, conciliation, and persuasion . . ."

"(b) If the Commission has failed to effect the elimination of an unlawful employment practice and to obtain voluntary compliance with this title, the Commission, if it determines there is reasonable cause to believe the respondent has engaged in, or is engaging in, an unlawful employment practice, shall, within ninety days, bring a civil action to prevent the respondent from engaging in such unlawful employment practice, . . ."

"(c) If the Commission has failed or declined to bring a civil action within the time required under subsection (b), the person claiming to be aggrieved may, if one member of the Commission gives permission in writing, bring a civil action to obtain relief . . ."

Under this version of Title VII, the charging party needed only the permission of a single member of the Commission to bring a civil suit, even if the charge was rejected by the Commission for lack of merit. The absence of a provision in the Senate substitute to provide for such a contingent is striking.

There is an absence of the usual keys to legislative intent because there are no committee reports for either the House Bill or the Senate substitute. The only legislative debate touching upon the problem is found at 110 Congressional Record 14186-92, Senate, June 17, 1964. Two distinctly opposite views of the role of the Commission and its findings as related to civil suits are presented, and are not of benefit to the Court.

The plaintiff's complaint to the Commission in the present action included allegations of discrimination upon two bases. The Commission found reasonable cause to be-

lieve that the plaintiff had been discriminated against because of his civil rights activities. The Commission mentioned the race allegation and then dropped it, without any finding as to reasonable cause. Under these circumstances, the plaintiff may not maintain a civil action under Title VII based upon the allegation of discrimination in employment due to race. Therefore, the defendant's motion to strike that portion of the amended complaint which alleges denial of employment due to race will be granted.

Dated this 13th day of May, 1969.

/s/ James H. Meredith
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title Omitted in Printing)

NOTICE TO TAKE DEPOSITIONS

(Filed May 27, 1969)

To: Edward T. Foote
Boatmen's Bank Building
St. Louis, Missouri

Please take notice that on June 16, 1969 at the hour of 10:00 a.m. we shall cause the depositions of Ivan Rutherford, C. M. O'Donnell, Robert Krone, James S. McDonnell, William J. Langton, Robert J. Lennahan, and Howard N. Morley to be taken at this office at 722 Chestnut Street, St. Louis, Missouri, before an authorized Notary

Public for purposes of discovery, at which time and place you may appear if you so see fit.

Dated this 26 day of May, 1969.

/s/ Louis Gilden
722 Chestnut Street
St. Louis, Missouri 63101
CH 1-6607

(Certificate of Service Omitted in Printing)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION OF DEFENDANT McDONNELL DOUGLAS CORPORATION TO QUASH NOTICE TO TAKE DEPOSITIONS AND SUBPOENAS

(Filed June 23, 1969)

Defendant McDonnell Douglas Corporation moves the Court to quash plaintiff's subpoenas and notice to take depositions of Robert C. Krone and James S. McDonnell and Ivan Rutherford on the following grounds:

1. Robert C. Krone is recovering from a serious heart attack and has been advised by his physician that being deposed in the immediate future might jeopardize his health. See attached affidavit.

2. James S. McDonnell, Chairman of the Board of McDonnell Douglas Corporation, had nothing whatever to do with the facts alleged in plaintiff's complaint, and has no first-hand knowledge of plaintiff's experience at McDonnell Douglas Corporation. His deposi-

tion would not reasonably lead to the discovery of admissible evidence and is being demanded merely to harass. See attached affidavit.

3. "Security Records" relating to plaintiff have no possible relevance to this case, and could not reasonably lead to discovery of admissible evidence. See attached affidavit.

Thomas S. McPheeters, Jr.
Edward T. Foote
Attorneys for Defendant
1600 Boatmen's Bank Building
314 North Broadway
St. Louis, Missouri 63102
241-6646

Bryan, Cave, McPheeters & McRoberts
Of Counsel

(Certificate of service omitted in printing)

Affidavit

(Title omitted in printing)

George S. Roudebush, being duly sworn, on his oath states as follows:

1. I am Vice President-General Counsel of McDonnell Douglas Corporation and held that position during July 1965, except that the company was then known as McDonnell Aircraft Corporation.

2. During July 1965 J. S. McDonnell was Chairman of the Board of Directors and Chief Executive Officer of the company and David S. Lewis was President and Chief Operating Officer; all matters of employment at that time were under the jurisdiction of Robert C. Krone, who reported to David S. Lewis. J. S. McDonnell, as Chief Execu-

tive Officer, was informed of various employment matters, but took no part in any decision relative to the employment of Percy Green.

3. Robert C. Krone has suffered a heart attack and is under the care of a physician and cannot presently testify at a deposition. The certificate of Sim F. Beam, M. D. dated June 4, 1969 to that effect is attached as Exhibit A.

/s/ George S. Roudebush

(Acknowledgment omitted in printing)

Sim F. Beam, M.D.
Clayton Medical Building
35 North Central
Clayton, Missouri 63105

June 4, 1969

To Whom It May Concern:

This is to certify Robert C. Krone is unable to make a deposition on June 16, 1969 because of ill health. It would be distinctly disadvantageous to his condition to make such an effort.

The date that such could be done safely cannot be accurately stated. Surely not earlier than two months could it be considered.

Signed Sim F. Beam, M. D.

SFB:mb

Affidavit

(Title omitted in printing)

C. L. Windsor, on his oath states:

1. I am Manager, Personnel Services, McDonnell Douglas Corporation (hereafter "McDonnell").

2. I was personally involved in all the decisions concerning the application for employment at McDonnell made by Percy H. Green on 26 July 1965.

3. The "Security Records" in the McDonnell Security Office were not referred to by anyone in the McDonnell Personnel Office regarding Mr. Green's application for employment. Those files were and are located in the McDonnell Security Office which is in a building separate from the Personnel Office.

4. No one from the Security Office was consulted about Mr. Green's application for employment.

5. The above statements are made to the best of my knowledge and belief.

/s/ C. L. Windsor

(Acknowledgment omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell Douglas Corporation, Formerly Known as McDonnell Aircraft Corporation, a Corporation,
Defendant.
No. 68 C 187 (2).

ORDER

(Filed July 30, 1969)

This matter is pending on a motion by the defendant to quash certain of plaintiff's notices to take depositions. A memorandum filed this date is hereby incorporated in and made a part of this order. Accordingly,

It Is Hereby Ordered that the motion of the defendant is granted and the notices to take depositions of Robert C. Krone and James S. McDonnell are quashed, on condition that an officer or managing agent of the defendant who has knowledge of the issues in controversy be directed to appear and have his deposition taken at the place indicated in plaintiff's motion within ten days from date. The subpoena directed to Ivan Rutherford directing him to produce the security records of the plaintiff is also quashed.

Dated this 30th day of July, 1969.

/s/ James H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell Douglas Corporation, Formerly Known as McDonnell Aircraft Corporation, a Corporation,
Defendant.
No. 68 C 187 (2).

MEMORANDUM

(Filed July 30, 1969)

On May 7, 1969, plaintiff filed a notice to take depositions and subsequently served subpoenas on several officers and agents of defendant McDonnell Douglas Corporation. Defendant has moved to quash certain of plaintiff's subpoenas.

Defendant moves to quash the notice to take the deposition of Robert C. Krone on the ground that Mr. Krone is recovering from a heart attack. The motion is supported by an affidavit from Mr. Krone's physician. Defendant also moves to quash the notice to take the deposition of James S. McDonnell, Chairman of the Board of McDonnell Douglas Corporation, on the grounds that he has no first-hand knowledge of plaintiff's relations with defendant McDonnell Douglas Corporation, that his deposition would not reasonably lead to the discovery of admissible evidence and that the deposition was requested merely to harass. Under Rule 30(b), F.R.C.P., this Court

has the power to issue an order for the protection of a deponent for good cause shown. Mr. Krone's illness is of such a nature that a protective order should be issued. He may be deposed at a later date should his condition warrant. Defendant's motion with respect to Mr. McDonnell is also supported by an affidavit to the effect that he has no knowledge of Mr. Green's relations with the defendant. This Court has discretion with regard to the taking of the deposition of corporate officers and may change the manner of taking the deposition or direct that the deposition not be taken when it appears that the official has no first-hand knowledge of the factual setting of the case. **Skookum Company, Inc. v. Sutherlin Machine Works, Inc.**, 33 F.R.D. 19 (D.Ore. 1963); **Colonial Capital Co. v. General Motors Corp.**, 29 F.R.D. 514 (D.Conn. 1961); 4 Moore's Fed. Prac. §30.06 (2d Ed. 1968).

Therefore, a protective order under Rule 30(b) will be issued for Mr. Krone and Mr. McDonnell on condition that an officer or managing agent of defendant who has knowledge of the issues in controversy be directed to appear and have his deposition taken at the place indicated in plaintiff's notice and within ten days from date.

Defendant moves to quash the subpoena duces tecum issued to Ivan Rutherford directing him to appear with the defendant's "Security Records" relating to plaintiff. For the purposes of this memorandum, plaintiff's subpoena should be considered as a motion for the production of documents under Rule 34, F.R.C.P. Rule 34 requires the showing of good cause by the moving party. In this case plaintiff has made no showing of cause. On the other hand, the defendant has filed an affidavit by the manager of its personnel services that the security records were not used during the consideration of Mr. Green's application for employment and that Security Office personnel were not consulted in the decision regarding Mr. Green's appli-

cation. Therefore, this Court will enter an order quashing the subpoena duces tecum for Ivan Rutherford to produce plaintiff's security records.

Dated this 30th day of July, 1969.

/s/ James H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

AMENDMENT

(Filed August 24, 1970)

Comes now the plaintiff and moves to amend his Amended Petition pursuant to the Federal Rules of Civil Procedure 15(b) in conformity and in accordance with the evidence adduced, by adding the following words to paragraph 8, page 2 of the amended complaint:

"[t]hat said discrimination is a violation of 42 U.S.C. §1981 in that it was based on race, color, and civil rights activities."

Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63101

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell-Douglas Corporation,
Defendant.
No. 68 C 187 (2).

JUDGMENT

(Filed September 25, 1970)

A memorandum dated this day is hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered, Adjudged, and Decreed that judgment is granted to the defendant. Plaintiff's complaint is dismissed with prejudice.

Costs are assessed against the plaintiff.

Dated this 25th day of September, 1970.

/s/ James H. Meredith
United States District Judge

The Memorandum Opinion of the District Court dated September 25, 1970, is printed in Appendix D to the Petition for Writ of Certiorari filed in this case, pp. A-40 through A-49, and is officially reported at 318 F.Supp. 846.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell-Douglas Corp.,
Defendant.
68C 187 (2)

NOTICE OF APPEAL

(Filed October 5, 1970)

Notice is hereby given that Percy Green, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order of the Court dated May 13, 1969, striking from the Amended Complaint the allegations of employment discrimination against plaintiff for the reason of race and from the final judgment entered in this action on the 25th day of September, 1970, granting judgment to defendant and dismissing plaintiff's complaint with prejudice and assessing costs against plaintiff.

/s/ Louis Gilden
Attorney for Plaintiff
722 Chestnut Street
St. Louis, Missouri 63103
241-6607

(Certificate of Service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20596—September Term, 1971

Percy H. Green,
Appellant,
vs.
McDonnell-Douglas Corporation, Formerly Known as McDonnell Aircraft Corporation, a Corporation,
Appellee.
} 68 C 187

JUDGMENT

(Filed March 30, 1972)

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered and adjudged by this Court that this be and is hereby remanded to the said District Court for further proceedings consistent with the majority opinion of this Court this day filed herein.

March 30, 1972

The Majority, Concurring and Dissenting Opinion of the Court of Appeals dated March 30, 1972, are printed in Appendix A to the Petition for Writ of Certiorari filed in this case, pp. A-1 through A-29.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,596

Percy H. Green,
Plaintiff-Appellant,

v.

McDonnell Douglas Corporation,
Defendant-Appellee.

On Petition for Rehearing.

ORDER ON PETITION FOR REHEARING

(Filed May 12, 1972)

Before Johnsen, Lay, and Bright, Circuit Judges

In response to a petition by McDonnell-Douglas Corporation for a rehearing, the majority of the court have decided to modify the court's opinion by striking Part V thereof and substituting a revised Part V, which is set forth below.

Judge Lay joins in the revised opinion and adheres to his prior separate concurring opinion.

Judge Johnsen dissents and files a supplemental dissenting opinion, which is set forth below.

In light of these modifications, the court denies McDonnell-Douglas Corporation's petition for a rehearing en

banc for the reason that the petition has failed to obtain the vote of a majority of the Circuit Judges who are in regular active service. A rehearing before the panel is likewise denied.

The denial of the rehearing is without prejudice to the right of either party to file a petition for a rehearing on the court's modified opinion.

The Revised Majority Opinion and the Supplemental Dissenting Opinion dated May 12, 1972, are printed in Appendix B to Petition for Writ of Certiorari filed in this case, at pp. A-31 through A-38. The original and subsequent opinions are reported at 463 F.2d 337.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20596 September Term, 1971

Percy H. Green,
Appellant,
vs.
McDonnell-Douglas Corp., etc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

ORDER

(Filed June 28, 1972)

The Court having considered renewed petition for rehearing en banc filed by counsel for appellee, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly divided Court.

Treating the petition for rehearing en banc as also being intended as a petition for rehearing to the original panel in the case, the petition for rehearing is denied by such panel, with Johnsen, Senior Circuit Judge, dissenting.

June 28, 1972

[1*] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Percy H. Green,
Plaintiff,
vs.
McDonnell-Douglas Corporation,
Defendant.

No. 68 C 187.
Court No. 2.

St. Louis, Missouri
January 12, 1970

TRANSCRIPT OF TRIAL

Transcript of testimony adduced and proceedings had during the trial of above-styled cause before

Honorable James H. Meredith

Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 2 thereof.

Appearances

Mr. Louis Gilden, attorney for plaintiff.

Mr. Edward T. Foote, attorney for defendant.

[2] Mr. Gilden: May I address the Court?

The Court: Yes.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic trial transcript.

Mr. Gilden: Your Honor, this is a matter that has been brought under Title 7 of the 1964 Civil Rights Act known as the Equal Employment Opportunity Act. I have talked to Mr. Foote prior to the trial here this morning, and we do have a stipulation we would like to give to the Court.

The Court: Very well.

Mr. Gilden: The stipulation is that Mr. Green did file a complaint with the Equal Employment Opportunities Commission of the United States, and the complaint that is attached to our Petition is the complaint that has been filed; that the matter was then referred to the Missouri Commission on Human Rights, that that was done; that the Missouri Commission on Human Rights then undertook an investigation of this matter and that the United States Equal Employment Opportunity Commission as well instituted an investigation of the matter and made findings in this matter; that their findings are attached to this complaint. And I think Mr. Foote has agreed that the Equal Employment Opportunities Commission did make the findings; and that there was a reasonable cause finding that was made on May 8th, 1967 that a reasonable cause existed to believe that McDonnell-Douglas did violate Section 704(a) of the Civil Rights Act of 1964. I think that is attached as Exhibit C. That the additional jurisdictional matter of notifi- [3] cation by the Equal Employment Opportunity Commission of the United States to the plaintiff was made that conciliation efforts had failed with the McDonnell Corporation: and that Mr. Green was then given what is known as a thirty-day letter, and I believe that is attached as Exhibit E to the complaint; and that he, of course, then filed suit within thirty days as required by law. Is that correct?

Mr. Foote: That stipulation is correct, Your Honor, with this modification, that we will reserve the right, if we may, to object to the introduction of the report of the

conclusions by the Civil Rights Commission, but we will stipulate that they so concluded as stated by Mr. Gilden.

The Court: Very well.

PLAINTIFF'S EVIDENCE

PERCY GREEN, II

was called as a witness and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Gilden

Q. Will you please state your name? A. Percy Green.

Q. Where do you live? A. 2987 Lawton Place.

Q. Are you presently employed? A. No, I am not.

[4] Q. How long have you been unemployed? A. Since June 13th of 1969.

Q. Mr. Green, were you employed by McDonnell-Douglas Corporation known as McDonnell Aircraft Corporation at one time? A. Yes, I was.

Q. When did you commence your employment? A. August 28, 1964.

Q. When did you first start working there? A. I'm sorry, August 27, 1956.

Q. What grade were you at the time you first obtained employment at McDonnell Aircraft Corporation? A. Grade 3.

Q. Grade 3 of what, sir? A. Radio, electric mechanic.

Q. Did your grade increase after that time? A. Yes, it did.

Q. Did it go to grade 2 after that? A. Yes, sir.

Q. In what year did that happen? A. That happened about '57, 1957.

Q. Then did it go to grade 1 after that? A. Yes.

Q. What year did that occur? [5] A. About '58, between '57 and '58.

Q. What kind of work were you doing when you were in grade 1? A. In grade 1 I was doing a type of work similar to that of grade 3. I also did much more complicated work on the flight line, some testing and trouble-shooting.

Q. What department were you in at the time you were grade 1? A. I was in the department that was called experimental. I first was in Department 156 and I later transferred out to the experimental department where a lot more sophisticated work was being done.

Q. What kind of equipment or product was McDonnell Aircraft Corporation making that you were performing work on? A. They were making two types of aircraft, one was called the Demon, a Navy plane, the other was called the F-101 Air Force.

Q. All right. Now you remained in grade 1 until what time, Mr. Green? A. I remained in grade 1 up until I was drafted; I was at the bottom of grade 1 by the way. I was drafted in 1958.

Q. Into the Army? A. Into the Army.

Q. How long were you in service? [6] A. Twenty-one months.

Q. What kind of discharge did you receive? A. Honorable.

Q. An honorable discharge? A. Yes.

Q. After you received your honorable discharge did you go back to work for McDonnell Aircraft Corporation? A. Yes, I did.

Q. When did that occur? A. It occurred about May of 1960, or June; I think I was released in May and I started back to work sometime in June.

Mr. Foote: Your Honor, may the record show that Mr. Gilden has asked me for the personnel file of Percy Green and I am herewith presenting it to him.

The Court: Very well.

Q. (By Mr. Gilden) Now when you went back to work at McDonnell Aircraft Corporation in May or June of 1960, what department did you go into? A. I was assigned to Department 174.

Q. What kind of work was that? A. That was side panels for the forward fuselage of the FOH, I believe it was.

Q. Was that an experimental airplane? A. No, it wasn't. It was in the beginning stage of the [7] FOH Phantom.

Q. What does that mean, Mr. Green? A. Well, it was sub-assembly for the, you know, this FOH was a Navy aircraft, and it was at the beginning stage, and I was assigned to the sub-assembly of the forward fuselage, which entailed routing of wire bundles, splicing various wires and so on and so forth.

Q. Was this similar to the type of work you had performed prior to the time you entered the service? A. Yes, it was, sir. It was similar.

Q. Were you also a grade 1 at the time of your return to McDonnell Aircraft Corporation? A. Yes. At the time that I returned I was at the top of grade 1.

Q. Do you know what your salary was at that particular time? A. I don't know, I believe it was about two dollars or something an hour.

Q. Now did you remain in that particular grade for some time, then? A. Yes.

Q. For what period of time? A. I remained in that grade up until which time later I requested a transfer.

[8] Q. What year was that, Mr. Green? A. That was in 19—You mean when I finally got the transfer?

Q. No. When you asked for a transfer on the first occasion? A. On the first occasion I requested a transfer from 174 to Department 156; however, there was no increase in pay or anything. But Department 156, which was considered as the wiré crib, was more or less like a transit operation, in order to move up, in order to move into other departments.

Q. Did you actually get transferred into 156? A. Yes, I did.

Q. All right. How long were you in Department 156? A. I was in Department 156 for approximately two, three, four months, before I requested an additional transfer to Department 189.

Q. What was Department 189?

Mr. Foote: Your Honor, I am going to enter an objection at this point. Mr. Green has established his employment at McDonnell-Douglas. We will be glad to stipulate that he was an employee, and that he later was laid off for lack of work and get to the issues at hand in this lawsuit which are, as I understand it, that he was refused employment allegedly because of discriminatory reasons when he came back and [9] reapplied. The Civil Rights Act took effect on July 2nd, 1965. Many, many cases hold that it is prospective and not retroactive in application. Any more details as to Mr. Green's former employment at McDonnell-Douglas I do not believe are relevant to this case.

The Court: What is the purpose of the history of his employment?

Mr. Gilden: Your Honor, the reason I am getting into it, of course I am not testifying here for Mr. Green, but I think that if Mr. Green were permitted to testify, he will testify as to the discriminatory practices on the part of McDonnell Aircraft Corporation prior to the time that he was laid off in 1964. And these discriminatory practices actually gave rise to the discrimination that occurred after the effective date of the 1964 Civil Rights Act. I wish the Court to know about Qualls v. Philip Morris Company, 271 Fed.(2d) 842. That said, and this was the holding of the Court, the present consequence of past discrimination acts are not outside the coverage of the act. It is just a question of showing the discrimination that occurred while he was employed prior to the time that he was laid off which gave rise to the discrimination that occurred in 1965.

The Court: The objection is overruled. Proceed.

Q. (By Mr. Gilden) Now I am sorry—Will you give [10] me the last question, ma'am?

(Question read by the reporter, as follows:
"What was Department 189?")

Q. (By Mr. Gilden) All right. A. Department 189 was considered as being the beginning stages of the electrical, of the electronic equipment division. It was just in the beginning stage.

Q. Were they working on any particular phase of production? A. Yes.

Q. What were they working on? A. At that time they were working on the, if I can remember, the direct radar scope camera and also the nose steering gear.

Q. Was this on the Gemini project or on an airplane? A. This was of the airplane.

Q. Of the airplane itself? A. That is right.

Q. Were you actually moved into Department 189? A. Yes.

Q. For what period of time did you remain there? A. I remained there—I remained there in that department up until the change. That department developed into later Department 966. The title was still the same, Electronic [11] Equipment Division but it was on a broader scope, which at that particular time produced a lot of other Navy and Air Force electronic equipment.

Q. Mr. Green, during this period of time had you had security clearance? A. Yes. I had a confidential security clearance when I first was hired.

Q. Did that remain with you during this whole time? A. Yes.

Q. Now after your department—you said Department 966 was almost the same as Department 189 except the number? A. That is correct.

Q. How long did you remain in Department 966? A. I remained in Department 966 up until I was finally transferred to Department 948 or 958.

Q. What was Department 948 or 958? A. It was Research and Development.

Q. Was that considered a promotion? Were you in fact later transferred to that department? A. Yes, later I was transferred in 1963 to that department.

Q. Was that considered a promotion at that particular time when you——

Mr. Foote: Object to the question, Your Honor. I [12] don't think the proper foundation has been laid and I don't think he is asking for an opinion—considered by whom?

Mr. Gilden: I think a man can testify if he believes he was promoted.

Mr. Foote: Well, if the question is whether he believes he was promoted, that is fine.

Mr. Gilden: That is all I am trying to find out.

The Court: OK.

Mr. Foote: I will withdraw the objection.

Q. (By Mr. Gilden) Did you believe you were promoted at the time you moved into this other department? A. Yes.

Q. Were you given another classification at the time you went into this department? A. Yes, the classification I was given at that time was Research and Development technician B.

Q. Do you know when the transfer was made, what year and what month? A. The transfer finally was made in 1963, the second time that I applied for the transfer.

Q. When did you first make the first request for a transfer? A. The first request was made sometime in 1962.

Q. In what month? [13] A. Approximately August or September, I believe.

Q. Now when you requested this transfer, whom did you talk to on the first occasion? A. The first occasion I talked with a section chief there in charge of the technicians by the name of Ed Sinecki.

Q. Ed Sinecki? A. Yes.

Q. Do you know whether he is still with the McDonnell Corporation? A. No, I do not know.

Q. He was called the section chief? A. Something to that effect.

Q. All right. A. He was over all of the technicians.

Q. Did you put your request in through him? A. Yes.

Q. Did you have a conversation with him? A. Yes.

Q. Can you tell us what that conversation was? A. Yes. At the time I requested to be transferred in 1962 he told me at the time that I would be making too much of a sacrifice and that the work up there was dirty and that it was not the wisest thing to do. He began to ask me about my appearance.

[14] Q. How were you dressed at that particular time? What was your attire?

Mr. Foote: I will object to the relevance of that, Your Honor.

Mr. Gilden: Well, the relevance, Your Honor, is that, here again it is for Mr. Green to testify to is that the nature of his dress was one of the factors in discussion and goes into the whole question of discrimination at that corporation.

The Court: Overruled.

A. I was dressed the same as other persons that was dressed in that kind of work, the production type work. I believe I had Levi's, a T-shirt, your know.

Q. Did you have a beard at that time? A. Yes.

Q. What did he say about your dress at that time? A. Well, he said that he prefer persons in that department who would dress casually because they had a number of sales persons to come through and interview—not to interview, but who come through and to look at the department and so on and so forth. And that——

Q. Was he referring to the department that you were in at that time before the transfer was made? A. No. No. He was referring to the department that I was applying for.

[15] Q. I see. A. From my remarks to him was that, how could he tell how I would dress before I was actually given the transfer, that I was dressed according to the way production persons worked, I mean dressed.

Q. Now did you—— A. (Continuing) He then began——

Q. I am sorry, go ahead. A. He then began to imply that instead of following an example——

Mr. Foote: I object to any testimony of what Mr. Sinecki may or may not have implied.

The Court: Sustained.

A. He told me that—he told me that upon me being transferred into that department, don't say I didn't warn you.

Q. (By Mr. Gilden) About what? A. About the great chances of me being terminated; that I would be confined to the menial and dirty work; and that he had a fellow at one time that worked ten years in the production area, production end of things there at McDonnell, and upon being transferred into the department, within a week's time he was laid off. And he just reiterated the great possibilities of me being terminated upon insisting upon coming into that department.

[16] Q. Why at that time did you want to transfer to this department? A. I wanted to be transferred to that department because of the kind of work I was doing at the time was—was testing, troubleshooting, supporting the engineers and various details regarding the equipment I was working on. And at the same time it would have given me a lot more exposure advancement into the field of technology and advance in pay.

Q. All right. Now at this particular time on this first occasion in which you asked to be transferred to this department 958, had you taken any training courses with McDonnell Aircraft Corporation? A. Yes.

Q. How many training courses have you taken? A. Oh, I taken a number of them. I guess, I think they would total, I taken blueprint reading at one time, I taken

many others, and my final course out there was in the field of electronics.

Q. Do you know what year that was in? A. It was in '62 over into I will say—I think it began in '62 and it was about a fourteen or fifteen week course, and I think I finally finished or completed that course in May of, May 14th, 1964.

Q. Were these courses offered at the plant at McDonnell [17] Aircraft? A. Yes.

Q. They were on your own time? A. Yes.

Q. They would be before work or after work? A. After work.

Q. After work? A. Yes. I was working during the day so I had to go to school in the evening.

Q. All right. Now after you had this first conversation with Mr. Sinecki and he told you what you have already indicated in testimony here, did you then make a transfer to Department 958? A. No, I didn't. I was frightened. I was frightened to the extent that he would actually terminate me because of his terms of wanting me——

Mr. Foote: I will object to that question and move that it be stricken from the record as not responsive.

The Court: Sustained. It may be stricken.

Q. (By Mr. Gilden) Based upon your conversation with Mr. Sinecki did you make a transfer? A. No, I backed out.

Q. Did you decide not to make a transfer? A. I decided not to.

[18] Q. All right. Then you continued working in this department 966 then for what period of time before you made application again? A. Approximately a year later.

Q. Do you know when you asked for transfer on the second occasion? A. I believe it was sometime in July.

Q. What year? A. 1963.

Q. Do you know whom you talked to on that occasion, the time you requested transfer? A. Let's see. Yes. I talked with Mr. Sinecki and Bob Godefroid this time.

Q. Who is Mr. Bob Godefroid? A. Bob Godefroid was the immediate supervisor under Ed Sinecki.

Q. Did you make a request through their offices then, these two gentlemen? A. Yes, I made a request again.

Q. Did they have a conversation with you on the second occasion? A. Yes, they did.

Q. Can you tell us what that conversation was? A. The conversation was basically the same as in 1962. [19] There was constant talk about the layoff and the, and the loss of seniority.

Mr. Foote: Your Honor, may we have who said what?

Q. (By Mr. Gilden) Will you tell us who said it, Mr. Green? A. All right. Ed Sinecki once again reiterated his statement about the darned chance I am taking for giving up my seven years' seniority to come into his department; and that once again there is a great chance of me being laid off. He said this about three or four times during our conversation. He mentioned, he talked about the dress again.

Q. What did he say about the dress? A. He asked me about my sunglasses, my tinted glasses, my eyeglasses, and I explained to him that they were tinted prescribed by, you know, an eye specialist. And he reiterated about the dirty work. I replied by saying that the work I have been doing all along has been, you know, rather dirty. I'm not afraid of geting my hands dirty and so forth and so on, and that I would like an opportunity, just to prove myself. Well, the conversation just went backward and forth around me giving up my seven years' seniority and the dress.

Q. Were you at that time a member of the Labor Union? A. Yes.

Q. What union was that? [20] A. The International Electrical, no, the International, I.A.U.W., or one of those —the Machinists Union. It would be Local 9, the regular Machinists Union that still exists there.

Q. This new department that you asked for the change to, was that non-union or union work? A. That was non-union.

Q. You would have a non-union classification, is that correct? A. That is right.

Q. Was that also explained to you at that time? A. Yes.

Q. And you were willing to accept a non-union status? A. That is right.

Q. Now did a change actually take place then, Mr. Green? A. Yes. The change taken place just before I had another conversation with a fellow by the name of Mr. Burgess.

Q. Before you had the conversation with Mr. Birge the transfer took place? A. Yes.

Q. All right. Now do you know when the transfer was made to this new department of 189, I am sorry, this would be—— A. 964.

Q. 964, I'm sorry? [21] A. 966.

Q. 966? A. I am sorry.

Q. When did the transfer take place to Department 966? A. That was from Department—that was when 189 was changed. I think you mean the transfer took place from Department 966 into Ed Sinecki's department, which was either Department 948 or 9——

Q. 58? A. 958.

Q. I meant 958. When did the change take place to Department 958? A. That transfer taken place about September of '63.

Q. All right. Now what kind of work were you doing prior to the time that you transferred to Department 958? A. I was doing testing, troubleshooting and repair; you know, testing various pieces of electronic equipment. And if the equipment didn't function, then it was my job to troubleshoot it and to make it function per engineering procedures, you know, the test procedures that the engineers have written up. And then also it was my duty to find the mistake and then repair it and then sell it to the McDonnell inspectors, and then sell it to the Navy inspectors before it could be shipped off to the Department of the Navy.

[22] Q. All right. Was this a Navy aircraft that was being worked on at the time? Was that why the Navy was interested? A. No, this was support equipment, ground support equipment, at this particular time. It was a much more sophisticated piece of equipment than what I was working on prior to the department change from Department 189 to Department 966.

Q. What kind of work was being performed at that time in Department 958? A. What kind of work was I doing there?

Q. What kind of work were they doing in Department 958? A. In 958 they were doing design work, and a great deal of the work was work the same as I was doing prior to my transfer. Some was troubleshooting various pieces and testing equipment and repairing it, in other words the greatest part of this work was the same identical work I was doing.

Q. You felt you had the qualifications to make the transfer? A. I sure did.

Q. You had the ability and capacity to do this work? A. Absolutely.

Q. Who was in charge of Department 958 to your knowledge at that time? A. Ed Sinecki was still in charge at the time.

Q. When you transferred to Department 958 were you given [23] a tour of the department? A. No.

Q. What is a tour, Mr. Green, based upon your information? A. The tour is to show a technician of the many different facets of the department, to meet some of the other persons, the engineers and the other technicians, and to familiarize a person to the nature of the work and so on and so forth.

Q. You were not given a tour then? A. No.

Q. Were you given a training period at the time the transfer was made? A. No.

Q. You went through no training courses for the work you were to perform? A. No.

Q. You remained in that department from September 1963 up until what date? A. August the 28th, 1964.

Q. What happened on that particular date? A. I was terminated. I was—well, the term that they used was laid off.

Q. While you were working in this particular department [24] 958 what kind of work did you perform? A. I was confined to menial tasks of making wire bundles for panels. Mainly my work was fabricating wire bundles for panels, various panels for the Gemini simulator.

Q. The Gemini simulator, was it the Gemini program at that time? A. Yes.

Q. Part of the satellite program? A. That is right, part of the space program.

Q. Were there men in that particular department using the talents that you had had prior to the time that you had moved over to this department, doing the same kind of work that you had performed before? A. Oh yes, certainly.

Q. You were not given the same work that you had performed before you were now in Department 958? A.

No, I wasn't. I was given a type of job that—I was given the kind of job that I had conducted when I first come to McDonnell, and that was, you know, in 1956. I was given, you know, the building of the wire bundles, routing wire.

Q. You started off then in grade 3, would you consider that about a grade 3 level? A. Absolutely.

Q. That you started out with when you first went to work [25] at McDonnell Aircraft Corporation? A. That's right.

Q. Therefore you knew the kind of work you had performed before and you knew the work that you were doing now, and the work you had performed before you went to the department was more sophisticated—— A. (Interrupting) That's right.

Q. And had needed more talent to perform? A. Yes.

Q. Is that right? A. Yes.

Mr. Foote: Your Honor, I object to the question as leading and also asking for the opinion of this witness.

The Court: I will sustain the objection.

Q. (By Mr. Gilden) I will ask you, Mr. Green, whether or not the talents you were called upon in Department 958 to perform was comparable to the talent that you needed to perform the work before you went to the department?

Mr. Foote: I will object to that question as asking for this witness's opinion and his interpretation of whatever talent, the word "talent", means.

The Court: Overruled.

Q. (By Mr. Gilden) You may answer the question, Mr. Green. [26] A. The work—I'm sorry.

Q. Let's rephrase it for you. You were moved over to Department 958, correct? A. That's right.

Q. All right. The work you were doing in Department 958 was comparable, you have already testified, to grade 3 that you performed and did the work when you first went with McDonnell Aircraft Corporation? A. That is right.

Q. Did you have the capacity to do better work than you did and were given in Department 958? A. Absolutely. Certainly.

Q. Did you have the capacity to perform the work that other members were performing that required greater talent? A. Absolutely.

Q. Were you given the opportunity to perform this work? A. No.

Q. At any time while you worked in this department—— A. There were a few times where I was given a litle module card.

Q. What was that answer, a module card?

The Court: Speak into the microphone.

A. I'm sorry. A module card, patch circuit, you know, is actually what it is. I was given an opportunity to test that [27] once in awhile. And—But that was so few—I mean the times that I had an opportunity to do this was so few that it was just like I hadn't really had any opportunity to do any test work. It is a little patch circuit that you just stick it in and a light triggers, and if it don't, something is wrong with the transistor, and I might have to replace it or something.

Q. (By Mr. Gilden) Now while you were in this department were you ever offered a job at Cape Kennedy? A. Yes. Bob Godefroid, about two or three weeks, I mean about two or three months after I was in the department, asked me would I, you know, would I take, would I go on a trip, a field trip, to Cape Kennedy. And I told him, I said, yes. You know, and I hadn't heard anything else

about it up until one time I did ask the lead or group engineer, by the name of Hammonds I believe, whatever happened to the request to go to Cape Kennedy. So his reply was well they had enough persons or they cancelled it or something to that effect. But I never was really given a reason why. And neither do I recall of any of the other technicians from the section that I was in going.

Q. Getting back to the year 1962 when you first made the request for transfer to Department 958 and then between that time and the time that you finally made the transfer, were there any other men that were transferred from the other departments, 189 or 966, to this new department 958? [28] A. Yes. A fellow by the name—What really inspired me was a fellow by the name of Leo Jeffress, who was requested. He was a union person who had more seniority than myself, and the department that I later requested a transfer to requested——

Mr. Foote: I will object to this testimony as hearsay, Your Honor.

The Witness: No, this is——

Q. (By Mr. Gilden) Do you know that another man was transferred? A. Yes. I know——

Mr. Foote: I object to that as having no proper foundation. I don't believe he has established how he knows anything like that.

The Court: I will sustain the objection.

Q. (By Mr. Gilden) Do you know whether any members were transferred from your department of 189 or 966 to Department 958 after you were told in 1962 that you shouldn't make the transfer? A. Yes.

Q. All right. Who were the people that made the transfer? A. The person that made a transfer was one Dave Lowe, and the other person was Leo Jeffress.

Q. Were they white or black people? [29] A. White.

Q. All right. Now in Department 958 that you went to, how many people were in that department when you worked there? A. I would say it was approximately one hundred technicians that was in the whole entire department.

Q. How many black people were in that department? A. Zero. None.

Q. Prior to the time you came in? A. That is right.

Q. You were the only black person at the time you were employed, is that correct? A. That is right.

Q. Now getting back to the Cape Kennedy, Cape Canaveral thing, you were never given any reason why the transfer was not made? A. No, I never was given any reason.

Q. But you were in agreement that you would make the transfer? A. Absolutely; yes.

Q. All right. Now in August 1960--strike that. During this period of time up until August 1964, were you engaged in any Civil Rights activities in the Metropolitan St. Louis community? A. I was.

[30] Q. Were you a member of any organization during that period of time? A. Yes.

Q. What organization or organizations were you a member of at that particular time? A. I was only a member of one and that organization was CORE.

Q. CORE? A. Yes.

Q. When did you join CORE to your knowledge? A. I believe it was in 1960, around 1961.

Q. Were you given any particular job or chairmanship while you were a member of that organization? A. In 1963, let's see, in 1964 about January I became the Employment Committee chairman.

Q. For whom? A. For CORE.

Q. All right. Now as Employment Committee chairman were you engaged in any Civil Rights protest activities in the Metropolitan St. Louis community? A. Yes.

Q. What type protest were you performing at that particular time? A. In '64?

[31] Q. Yes. A. I believe we were still at the Jefferson Bank situation there, for jobs at the Jefferson Bank for blacks. And we was in the committee—well let's see. I think that was the only protest demonstrations that were going at that particular time. But it was winding itself up around January of '64, and it was—I became the employment chairman just before that project was ended.

Q. From January 1, 1964 to August 1964, were you engaged in any Civil Rights protests in the community? A. Yes.

Q. What was that protest? A. It was the Gateway Arch and the construction industry.

Q. The construction industry around the Gateway Arch? A. That is right.

Q. When did that begin, Mr. Green? A. That began in January 1964, with the research and all the other, the actual protesting began in July, early July.

Q. Of 1964? A. I would say 1964.

Q. Did you participate personally in the demonstrations at the Arch? A. Yes.

Q. Did you do anything—Strike that. What did [32] you do by way of your own demonstration? A. Well, I participated in the picket lines and on July the 14th of 1964 myself and another fellow, I can't recall his name now, climbed the Gateway Arch.

Q. Now on that particular date were you still employed by McDonnell Aircraft Corporation in Department 958? A. Yes, I was.

Q. Did your climbing of the Arch in any way interfere with any of your duties at McDonnell Aircraft Corpora-

tion? A. No, they did not, because at the time that I climbed the Arch I was working on the third shift. The climbing of the Arch was done during the day. However, I was working, I was asked to go on the third shift.

Mr. Foote: I object. The answer is not responsive to the question.

A. No, it didn't interfere.

Q. (By Mr. Gilden) It did not interfere? A. No.

Q. Now at any time up until August of 1964, did any of your Civil Rights activities interfere with your employment in any way? A. No. In no way or form.

Q. Were you ever late for work because of your Civil Rights activities? [33] A. No.

Q. Were you ever absent from work because of your Civil Rights activities? A. No. I went—The only time that I was late or maybe absent a few times was after I found out that my mother had cancer.

Q. Was that after you had made the switch into a particular department? A. That is right.

Q. What department was that, Mr. Green? A. That was in Department 958 when I became a research and development technician.

Q. For what period of time did you have some absences because of your mother's illness? A. It was at the—Oh, I guess about—After I was on the third shift. It was about that time when, you know, my family discovered that.

Q. Then after, you say on a few occasions you were absent, is that correct? A. That is right.

Q. After that did you have a good work employment record? A. Yes.

Q. At McDonnell Aircraft Corporation? A. That's right.

[34] Q. You said you climbed the Arch on July 14th, 1964? A. That is right.

Q. Do you know of your own knowledge the effective date of the Equal Employment Opportunity Act? A. The Equal Employment Opportunity Act, the effective date as pertains to employment was the 2nd of July, 1965.

Q. July 2nd, 1965? A. That is right.

Q. Do you know when it was enacted of your own knowledge? A. Well, the Bill itself was a year prior to July the 2nd, 1964, but the employment end of it was enacted in '65.

Q. You mean the enforcement date, the beginning? A. The enforcement date.

Q. Now in August of 1963, you have already testified that you were laid off, is that correct? A. August of '64.

Q. '64, I'm sorry, is that correct? A. Yes.

Q. Now when did you first receive information about your layoff? A. I received that information about a week or maybe a week and a half before the termination date.

Q. How did you receive this information? A. Bob Godefroid went around and asked certain [35] persons, and he finally come up to me and said that he was asking—that I was asked to report over to a certain room for testing, and that there were eighteen of us, and we were slated for layoffs, and that we were required to go over and take a test in order to see whether we could be placed elsewhere.

Q. At that particular time, Mr. Green, were you still the only black employee in that department? A. That is right.

Q. Then you would have been one of the eighteen to be laid off or given tests, is that correct? A. That is right.

Q. Did you then go over to the room to take the test? A. Yes. I went over to that room and the fellow there

said that the test wasn't mandatory and I—He asked whether there was any questions and I raised my hand, and he recognized me. I told him that I would like to not take the test because I had just finished an electronics course on my own time there at McDonnell and that the same time that I think that my work record speaks for itself as far as being placed in some other department, and that could I be excused. And he said yes. And I was the only person who did not take the test. So I come—I went—I then left the testing area, the testing room, and returned to my work station.

[36] Q. Did you later request a meeting with any of the supervisory personnel? A. Yes.

Q. Who were they? A. I asked to speak with Godefroid and Ed Sinecki.

Q. Did you in fact hold a meeting with them? A. Yes, I did.

Q. Can you tell us what Mr. Sinecki said and what Mr. Godefroid said? A. Well, first I asked Godefroid and Sinecki how could they determine who were to be placed on the—placed on the layoff list. They then replied to me about, he then told me about a totem pole, and I didn't understand. I asked him would he be kind enough to explain to me how does it work and everything. And he began to tell me that this opinion of placing various persons at various points on the totem pole was his own evaluation plus Ed Sinecki's and some of the engineers.

Q. Were you told how men were placed on this totem pole? A. Im sorry.

Q. What went into placement on the totem pole? Were you told how it was made up? A. No, he never did really tell me, he just said it was based on his observations of the work and so on and so forth.

[37] Q. Were you ever shown a copy of this totem pole? A. Ummm——

Q. I mean at that time. A. Not that I can—No, I don't think I was.

Q. Were you ever told that men above you on the totem pole were also being laid off? A. No.

Q. You weren't told your placement on the totem pole at all? A. No. He just told me that I happened to fall within the eighteen persons that were being laid off.

Q. Were you told at that time when a decision was made for layoff? A. I'm sorry, you said——

Q. Do you know when the decision was made for layoffs? Were you told the date? A. No, I never was told.

Q. What else transpired at that meeting? A. Well, I asked him—I asked him that—I told him, I said in lieu of my past record and my job performance, even though I had undergone all of the tests that was perpetrated upon me, the harassment and some of the other things you know——

Mr. Foote: I object to that answer as not responsive and a gratuitous statement of this witness's opinions and not [38] proper evidence.

Mr. Gilden: You are objecting to the whole answer, or just to the——

Mr. Foote: To the word "harassment".

The Court: Sustained.

Q. (By Mr. Gilden) Just go on, Mr. Green. A. And the treatment, and I never did, rebuttal, I pointed out that my work performance was certainly considered by a number of the engineers, even though it was menial work, but it was high quality, and that I couldn't really understand how I could fall within that jurisdiction, when there were so many other persons that couldn't do and their quality of work wasn't near up to the expectations.

Q. Was any more said about your taking the test? A. Well, yes. I think at this point he asked, "Why didn't you take the test?" I told him, I said, "Well, I think that it wouldn't be to my best interest to take the test with men who were already slated for layoff." I told him, just to prove that I was capable and competent more so than the persons that you are retaining, I would love to take a test with the persons that you plan to retain, and that if my score doesn't beat, I mean if my score wasn't better than three-quarters of the persons that you plan to retain, that I would be willing to be laid off.

[39] Q. What did they say to that? A. Well, they said no dice, you know. We can't do it.

Q. They did not give the test then, to your knowledge, to the men that were retained, is that correct? A. No.

Q. Was any more said after that particular conversation with Mr. Sinecki and Mr. Godefroid? A. Yes. I then asked could I have permission to speak with someone in personnel, their immediate supervisor.

Q. Was a meeting set up for you then after that? A. I originally wanted to have a meeting with Dave Lewis who was the president of the firm. He was out of town so they say at that time. And they told me that the chain of command would be to go to George Peck who was the general manager over EED. So I said, well——

Q. Tell us what the initials E.E.D. stand for? A. The Electronic Equipment Division.

Q. That was the division that you were in, is that correct? A. That is right.

Q. That was the kind of work you had been performing? A. That is right.

Q. All right, go ahead. A. So, finally I was given an opportunity to meet with [40] Mr. George Peck in his office, and at that time was when he was accompanied by Mr. Windsor, Duke Windsor.

Q. Do you know Mr. Windsor's title at that time? A. Yes. He was second in command to R. C. Krone, who was vice president of personnel at that time, so I believe his title was general manager or something to that effect.

Q. What happened at this particular meeting? A. At this meeting we discussed the layoff situation and the totem pole bit. And Mr. Peck reassured me that he would take a look at my record and so on and so forth, and that he couldn't understand either, you know, that, you know, with the work record that I had and so on and so forth, that they wouldn't be able to place me elsewhere if they couldn't keep me there. However, during the course of the conversation Duke Windsor, thumbing through my personnel file, asked me about the Arch situation. He asked me do I feel whether or not I am going to be convicted for climbing the Arch and I told him——

Q. Was this the first time you had ever met Mr. Windsor? A. Yes.

Q. That was your first—— A. (Interrupting) That was the first time that I met him.

Q. I see. All right. A. And I noticed that that clipping, you know, the newspaper clipping was in my file. And I asked him could I see [41] it and he said, well, yes, no.

Q. He said what? A. No, I wasn't allowed to look at my file. So the meeting ended, and Mr. Peck said he would look at my record and that he would talk with me later.

Q. What was your purpose in the meeting? Why did you call the meeting? A. Well, I called the meeting—the purpose of the meeting was to get some better answers than what I was getting for being laid off, than what I received for being laid off.

Q. Was it your purpose to remain on the job? A. The primary purpose was to show that there was an error in

my being terminated with my long service with the company and my better job performance and so on and so forth.

Q. All right. A. And I wanted to give the company an opportunity to study the situation and to make the necessary changes. So Mr. Peck said, well, he would look at my record and he would, you know, call me back, let me know something.

Q. Do you know how long before your termination you had this meeting? A. It must have been—I think I had about a week left.

Q. All right. [42] A. Sure enough, Mr. Peck called me back over and he said, at this time Windsor wasn't present, and he told me he didn't, you know, he didn't understand how this come about either. But that is the way the game was played, so to speak, you know, and that, you know, even though he is sympathetic, there is very little that he could do about it, you know, and that was basically it.

Q. Did you have any meetings with any other supervisory personnel after that meeting? A. Yes. After that I requested to meet Mr. Krone.

Q. Were you given the opportunity of meeting with him? A. Yes.

Q. When did that meeting take place? A. One meeting taken place—one meeting took place about two days before the—about three days prior to my actual layoff, and this meeting was held in Mr. Krone's office.

Q. Who was present at that particular time? A. Mr. Krone and Duke Windsor.

Q. What was stated in your presence? A. It was stated that I was not—that he would investigate the situation; that he doubt very seriously whether I was laid off; and that they were trying like everything in order to get me placed in some other department that I would be doing

about the same kind of work; and that he was certainly [43] looking into the matter; and the day of the layoff, about four hours prior to, you know, the quitting time, I was asked to come over.

Q. Over where? A. Over to Mr. Krone's office where Duke Windsor was present again, and we had a four-hour session. And Mr. Krone informed me that he had investigated the situation; that there was no acts of discrimination; that he had tried and tried and tried in order to place me in some other department; and all this was seconded by Mr. Windsor, you know.

Q. Had you made any complaints about discrimination about being a black man prior to that meeting? A. Did I complain of discrimination?

Q. Against you because of your color to anybody in any department? A. Well, yes. Yes, I made mention of that to Sinecki and also to Mr. Peck on the way up, you know, that it seemed awful strange to me of me being the only black person in the department and the only black person who ever been in that department, you know, for them to see fit in order to cut me out of the picture. And this was reiterated even in the presence of Mr. Krone and Windsor. Of course, they taken exceptions to it. They began to say, well, they mentioned the totem pole also. And they began to say, well, you can rest assured after my investigation it is no base for such a charge, [44] and that you remember you was warned prior to coming into this department, you are coming in at your own risk. I pointed out, I say, well, is there any way I would be judged on the merit of my work, and one thing led into another. And Mr. Windsor had some input and we exchanged various——

Q. Was there any decision then to retain you or were you to be laid off? A. No, there was no decision to retain me. It was that you will be laid off until we happen to

find a place for you, and if so, you know, we will call you and let you know.

Q. At the time that you had this conversation, this last one, before being laid off, with Mr. Krone, he told you that he had done an in-house work-up on your matter? A. I'm sorry.

Q. He had done some work inside the corporation on the charges that you had made? A. Yes. That is what he said.

Q. Did he have papers in front of him at that particular time showing he had done a work-up? A. No.

Q. At the time that he talked to you? A. No. No. It was just strictly off-the-cuff type of conversation.

Q. Were you in fact laid off? [45] A. Yes.

Q. Can you tell the date of that layoff? A. Yes. On my birthday, August the 28th, 1964.

Q. Now on August the 28th, 1964, were you still chairman of the Employment Committee of CORE? A. Yes.

Q. Shortly thereafter was there a demonstration in front of Mr. McDonnell's home? A. Shortly thereafter? Let's see. Shortly thereafter—first there was some communication from the organization to——

Mr. Foote: I don't believe that is responsive to the question, Your Honor.

Q. (By Mr. Green) Was there a demonstration? A. Yes, it was a demonstration.

Q. Was there any correspondence between the organization and the McDonnell Aircraft Corporation? A. Yes.

Q. Were there any demands placed upon McDonnell Aircraft Corporation by CORE? A. Yes.

Q. What were these demands? A. These demands was, one, that I be reinstated into my job, reinstated as far as my job was concerned; two, that they upgrade and hire

more black persons into the better-paying jobs, [46] you know. One was hiring and the other was upgrading, and the reinstatement of myself I believe it was.

Q. Did you, after your layoff, at any time, file any charges of discrimination against McDonnell Aircraft because of the layoff with any federal or state agencies? A. Yes. I filed charges with the President's Commission on—the President's committee or commission on Civil Rights activities.

Q. Was that the commission that Franklin Delano Roosevelt, Jr. held at that time as chairman? A. I don't think so. I think this was the commission that was existing before the Equal Employment Opportunities Commission, Franklin Delano Roosevelt taken over the E.E.C.

Q. That's right. A. And I filed——

Q. Who else did you file charges with? A. I filed complaints with the Justice Department. I filed complaints with the Navy Department, the Department of Defense, you know, about five different agencies. I don't recall exactly the names.

Q. Were these complaints filed after CORE had made its demands or prior to the time CORE made its demands, do you know? A. Always prior to the demands. I filed the complaints always before the demands.

[47] Q. Before the demands were made by the organization? A. That is correct.

Q. Based upon the complaint that you made with the federal and state agencies, were you interviewed by any man from any federal or state agencies after that? A. Yes.

Q. Whom were you interviewed by? A. I was interviewed by at that time a Lt. Wolf, who was from the Navy Department. I was interviewed by a Mr. Peter Robinson from the Missouri Commission on Human Rights. I was also interviewed by a fellow by the name of Morley.

Q. Howard Morley? A. Howard Morley.

Q. Who was he associated with? A. He was associated with the federal people.

Q. Would that be the Federal Office of Contract Compliance, do you know? A. I think so.

Q. Or was he with the Navy Department? A. Well, I can't recall. It seemed like to me he was working with a combination of both the Compliance as well as the Navy. I don't really know.

Q. They all interviewed you subsequent to your charges being placed with these various agencies, is that correct? [48] A. That is right.

Q. Now did you participate in the picketing at Mr. McDonnell's home? A. Yes.

Q. Did you know where Mr. McDonnell lived at that particular time? A. Yes.

Q. Where did he live? A. No. 1 Glenview Drive, Ladue.

Q. Where did the picketing take place, Mr. Green? A. It taken place on, is it Warson Road? It taken place there at the intersection of Glenview Drive and that busy section, I don't recall the name of that street. I don't know whether it is Warson Road or what it is.

Q. Did any of this picketing take place on Mr. McDonnell's property? A. No. There was an arrest situation.

Q. Who was arrested? A. A lady by the name of Judy Weston.

Q. I see. Were you arrested at that particular time? A. No.

Q. You stated that the picketing did not take place on his property? A. No.

[49] Q. Was there any injury to any person or property arising out of that picketing? A. No. None. In fact——

Q. OK. Now after you left the employment of McDonnell Aircraft Corporation and you were laid off on August

28th, 1964, did you go to work after that? A. No, I was unemployed for a whole entire year.

Q. How much were you making on the date of your layoff? A. I was making better than three dollars an hour.

Q. How many hours a week were you working? A. I was working forty hours a week.

Q. Was there also some overtime during this period, if you know? A. It was some periodically.

Q. You said you were unemployed. For what period of time were you unemployed? A. I was unemployed from August 28th, 1964, up until sometime about the middle of September of '65.

Q. Where did you go to work in September of 1965? A. I went to work for Bianco Manufacturing Company.

Q. What was your job or title at Bianco Manufacturing Company? A. Inspector.

Q. How long did you work there? [50] A. I worked there from that period up until about June 1966.

Q. Did I ask you to bring your records with you, your employment records with you this morning? Do you have those as to what you earned during the years 1965 and '66? A. Yes, I have that out there.

Q. Well, we will get to that a little bit later. A. OK.

Q. Now did anything unusual occur in the month of July, 1965, with respect to the McDonnell Aircraft Corporation? A. In July '65?

Q. Right. A. July of '65. July the 2nd of '65, yes, another demonstration taken place. That was to focus the attention upon the enforcement of the 1964 Civil Rights Act as it pertained to employment. And that demonstration taken place, it was a series of demonstrations.

Q. Was this in honor of the observance of the effective date of the Federal Equal Employment Opportunity Act, is that correct, Mr. Green? A. Yes.

Q. Is that correct, Mr. Green? A. Correct, yes.

Q. It was July 2nd, 1965? [51] A. That is right.

Q. CORE was engaged—— A. (Interrupting) No.

Q. Which organization? A. ACTION.

Q. When did you switch over from CORE to ACTION? A. In October of '64.

Q. In October of '64 you made the move into a new organizational structure, is that correct? A. That is right.

Q. That name was ACTION? A. That is right. At that time it was called Action Council to Improve Opportunites for Negroes.

Q. Was the basic purpose or philosophy of ACTION at its inception the question of equal opportunities for blacks in employment? A. That is right.

Q. That was basically the work you had done before with CORE, is that correct? A. That is right.

Q. And that was a carry-over into the work that ACTION was performing? A. That is right, somewhat.

Q. Now what was your title with ACTION on July 2nd, 1965, [52] the effective date of the '64 Civil Rights Act? A. Chairman.

Q. Chairman of ACTION? A. That is right.

Q. What series of demonstrations took place on July 2nd, 1965? A. We were demonstrating at Union Electric for better paying jobs for the black male, and there was also a picket line later went up to the Roberts Building.

Q. Who was housed or tenants in the Roberts Building? A. The McDonnell personnel.

Q. Where was the Roberts Building located? A. Twelfth and Delmar, I believe.

Q. Did you demonstrate in front of the Roberts Building on that particular date? A. Yes.

Q. What was the purpose of that demonstration? A. To focus upon the enforcement of the 1964 Civil Rights Act as pertained to employment.

Q. Were you arrested arising out of that demonstration? A. No.

Q. You were not? A. No.

Q. Were you arrested at all on that particular date aris- [53] ing out of any of these demonstrations that took place on the effective date of the law? A. No.

Q. Was there any injury to persons or property arising out of the demonstration in front of the Roberts Building? A. No.

Q. After July 2nd, 1965, did you have occasion to go to the premises of McDonnell Aircraft Corporation? A. Yes.

Q. What was the purpose of going there? A. Employment.

Q. To get a job? A. Yes.

Q. What day did you go there to get a job? A. I went there—let's see. The ad appeared July 25th. I went there on July 26th. I went there July 26th, that was a Monday I believe, 1965.

Mr. Gilden: Will you mark this Plaintiff's Exhibit 1?

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit 1.)

Q. (By Mr. Gilden) Mr. Green, I will hand you what has been marked Plaintiff's Exhibit 1 and ask you if this is the application for employment that you filled out at that time?

[54] The Court: Plaintiff's Exhibit what?

Mr. Gilden: Plaintiff's Exhibit 1, Your Honor.

A. Yes, this is it.

Q. This is it? A. Yes.

Q. What is the date of that application? A. 7-26-65.

Mr. Gilden: I would like to introduce into evidence Plaintiff's Exhibit 1.

Mr. Foote: No objection, Your Honor.

The Court: It may be received.

Q. (By Mr. Gilden) What time did you get down to McDonnell Aircraft on that particular date? A. Oh, it was early that morning, approximately 8:00, 8:30, 8:15.

Q. Did anybody come with you? A. Yes.

Q. Who did you have with you? A. At that time Betti Ruffin.

Q. Is she in any way related to you at present? A. Yes.

Q. What is she? A. Wife.

Q. She is your wife? At that time you were not married? [55] A. No.

Q. She came with you? A. Yes.

Q. What office did you go to for your application for employment? A. Personnel office.

Q. All right. Were there other people there in attendance at the time you walked in? A. Yes, there was a few other persons.

Q. All right. Can you tell me whether there is a receptionist? Just tell me what happened? A. Well, I— the receptionist was present. And I went up to her and requested an application. She gave it to me. And I sat down and filled it out. Then I returned it to her, and she told me to have a seat. At that point the application goes behind the scene, you know, to the interviewing, I would assume.

Q. Do you know what happened to the application of your own knowledge? A. No. She taken the application and then she taken it in the back there somewhere.

Q. All right. She walked back with it you mean? A. Yes.

Q. All right. [56] A. And Betti and I were sitting there, and we were observing various things. Finally we observed a black fellow who came up into a little vestibule, so to speak, and he just kept, you know, watching and carrying on, you know, looking at me. I couldn't believe it at first. But every so often he kept glancing over. So we sat there and sat there and sat there, and then finally a person called us up to the window. A fellow I later learned to be Mr. Johnson, and I was at the point, at that time I was observing the time, the number of persons in the place and also observing their badge number and everything.

Q. Was he white or black? A. Oh, he was white.

Q. White? A. Yes. And he told me, "Well, thank you very much for submitting your application at McDonnell. We will call you as soon as we find a place that we can use you." Well, Betti and I both was up there. So I asked him, I said, "Well I have an ad here that was published in yesterday's paper. Are you telling me that you have filled up all of the grade 2's and what not?" So he said, "Well, I am sorry. Thank you very much for putting in your application. As soon as we find something for you, we will call you." I asked him the question again. I showed him the ad. He become very nervous and he [57] finally told me, he said, "Well, listen, I have other people. I have to work, I have to wait on them, and would you be kind enough to remove yourself from the premises?" So I asked him, I said, "Would you be kind enough to let me speak to your immediate supervisor?" Once again in a trembly voice he said, "I am going to ask you again, would you kindly leave

the premises?" And at that point I said, "Well, thank you very much." And Betti and I left.

Q. Did you hear any more from anyone after you made application for employment? A. No.

Q. From the company? A. No.

Q. Were you ever sent a letter that you had been accepted for employment? A. No. And the ad just kept appearing in the papers thereafter?

Q. What job were you applying for at McDonnell Aircraft on July 26, 1965? A. I was applying for the grade 2 radio electric mechanic.

Q. Was that the job that had been advertised in the newspaper the day before? A. That is right.

Q. Do you know what newspaper it was in to your knowledge? [58] A. The Post-Dispatch.

Q. All right. They were looking for certain people to fill these positions? A. Right. That is right.

Q. You were never accepted for employment, were you? A. No, I wasn't.

Q. After July 26, 1965, did you ever have any personal contact with any of the officers or supervisory personnel of McDonnell Aircraft Corporation later known as McDonnell-Douglas Corporation, or McDonnell Corporation? A. Had I had any contact with any of the——

Q. Supervisory or officers or anyone else in corporate positions with the company? A. Nothing that I can recall. I don't know whether that was—I don't know whether Mr. Krone was speaking some place and I attended that meeting or not. I don't believe so. After '65, after the 26th day of '65, of July of '65, I don't believe that I had any other contact.

Q. Had you, after you didn't receive any response to your application, I assume you received no response at all, yes or no? A. No, I didn't receive any response.

Q. Either rejection or acceptance? A. No.

[59] Q. You received nothing? A. Nothing.

Q. Did you file a charge then with the Equal Employment Opportunity Commission? A. Yes.

Q. Did you also file a charge with the Missouri Commission on Human Rights? A. I did.

Q. After—strike that. These meetings with Mr. Robertson and Mr. Morley, that you testified to before, were they meetings held before you had applied for employment in July of 1965 to your knowledge? A. No. They were—these meetings that I had with those fellows taken place after the filing of the complaint.

Q. Which complaint are you talking about? The one on the layoff or the one where you were refused a job? A. Well, it was an investigation when I was immediately laid off.

Q. All right. A. Then after I filed the other complaint, I believe it was in September of '65, Howard Morley, I believe, and some other persons conducted the investigations. I'm not sure whether Peter Robinson was—I'm not sure whether Peter Robinson was with the Equal Employment Opportunities Commission [60] during this latter.

Q. You were interviewed, were you not? A. Yes.

Q. Pursuant to this charge of discrimination? A. Yes.

Q. Based upon the fact that you were not hired, is that correct? A. That is right.

Q. Mr. Green, how far did you go in school? A. I finished Vashon.

Q. High School? A. High School. Here in the City of St. Louis. I also studied electronics from Devry Technical Institution, 4141 Delmar Avenue, Chicago, a correspondence.

Q. Is that a correspondence course? A. Yes.

Q. In addition to that you have already testified you had certain training programs at McDonnell Aircraft Corporation? A. That is right. Also when I was drafted I was sent to Ft. Monmouth, New Jersey, to study the missile and radar system.

Q. Missile systems? A. And radar.

Q. Now did McDonnell Aircraft at the time you returned [61] from the Army know about your prior experience in the Army? A. Yes, but it was just disregarded.

Q. I see.

Mr. Foote: I will object to that answer as not responsive to the question and ask that it be stricken as an opinion of this witness.

The Court: It may be stricken.

Q. (By Mr. Gilden) Now after you weren't hired—strike that.

The Court: How much longer is his testimony?

Mr. Gilden: Oh, I think I have a lot of documentary evidence to get in, Judge.

The Court: Let's take a recess until 1:30.

(Thereupon, the Court declared a recess until 1:30 p.m. the same day, January 12, 1970.

During the recess, at the request of counsel for the plaintiff, Plaintiff's Exhibits 2 through 32 were marked by the reporter for identification.

At 1:30 p.m. on January 12, 1970, court was duly reconvened, the parties appeared and the following proceedings were had:)

[62] Afternoon Session

Monday, January 12, 1970; 1:30 O'Clock P.M.

Mr. Gilden: Your Honor, before we start there are two depositions that should be filed with the Court, the deposition of Percy Green taken May 2nd, 1969, and July 2nd, 1969. They were in my possession for signature, but Mr. Foote and I stipulated they may be filed without signature by agreement.

Mr. Foote: That is correct, Your Honor.

The Court: Very well.

PERCY GREEN, II

recalled, having been heretofore duly sworn, testified further as follows:

Direct Examination (Continued), by Mr. Gilden

Q. Mr. Green, you have already testified, I believe, that after September 1964, you were unemployed for some time is that correct? A. That is correct.

Q. What was your first employment after September 1964? A. My first employment was for Bianco Manufacturing Company.

Q. That began when? A. The middle or the latter portion of September 1965.

Q. How long did that job last? [63] A. I worked there up until '66, June.

Q. Of 1966? A. Right.

Q. Where did you work after that? A. After that I went to work for the Jewish Employment and Vocational Service.

Q. When did you start that employment? A. June or July of '66.

Q. How long did that last? A. That lasted up until '68, June.

Q. June of '68? A. That is right.

Q. Where did you work after that? A. A construction job, Opportunity program.

Q. When did you start that job? A. June '69, June '68 up until I was—up until June 13th, '69.

Q. June 13th, '69? A. That is right.

Q. Where were you employed after that? A. Unemployed.

Q. You have been employed since June 13th, 1969? A. That is right.

Q. Now, have I asked you to bring a record of your [64] earnings from the time of July 1964 into court this afternoon? A. Yes.

Q. Do you have the record of your earnings with you? A. Yes, I do.

Q. Do you want to get that, Mr. Green? A. (Witness leaves the stand and returns with some documents.)

Q. In the year 1964 what were you earning?

Mr. Foote: Objection, Your Honor. I don't believe this is the best evidence. There has been no foundation laid to show the W-2 forms or original documents are destroyed or are not in existence or in Mr. Green's possession.

Mr. Gilden: He can testify what he made during the course of a year and that would be sufficient evidence; it is not necessary that he have W-2's, that isn't the best evidence. His own testimony would substantiate his earnings.

Mr. Foote: The best evidence are the documents reflecting how much he was paid, not his recollection several years later.

The Court: Is this a document he made up from his own memory?

The Witness: No, it is not. This is a document I made up from my——

Q. (By Mr. Gilden) Tax records? [65] A. Yes.

Mr. Foote: I think the best evidence then would be the tax records, Your Honor, that purport to support this document and any questions relating to it.

The Court: I will sustain the objection.

Q. (By Mr. Gilden) Where are your tax records now, Mr. Green? Are they in your possession here this afternoon? A. No, not in my possession at the moment, they are at home.

Q. They are at home? A. Yes.

Q. Now you have testified that you picketed Union Electric Company did you not? A. That is right.

Q. When did you do that? A. This began in '65 along with the picketing of the other utilities and other companies.

Q. What were the other companies and other utilities that you—was it you or your organization that was picketing? A. It was the organization.

Q. That would be ACTION? A. ACTION.

Q. What companies did they picket? A. Southwestern Bell, Union Electric, Laclede Gas, [66] Globe-Democrat, Krey Packing Company, Wonder Bread.

Q. Is that also known as Continental Baking? A. Continental Baking.

Q. When did you picket Union Electric?

Mr. Foote: Objection. Was the question when did you picket?

Q. (By Mr. Gilden) When did the organization picket Union Electric? A. It began in '65 shortly—let's see now. '65, it started in April. It was about between April—well, it was between April and June of '65. We started with Southwestern Bell and went to Laclede Gas, went back to Southwestern Bell and then the Union Electric and then from Union Electric to, by that time it brought us up into July and that is when we went into the McDonnell and Roberts Building and shortly thereafter the Globe-Democrat Building.

Q. When did you start with Southwestern Bell? A. April of '65.

Q. Then you went from there to Laclede Gas? A. Laclede Gas.

Q. When did you start commencing protest demonstrations there? A. At Laclede Gas about one week later.

Q. Where did you go from Laclede Gas, to Union Electric? [67] A. No. We went back to Southwestern Bell.

Q. When would that have been? A. That should have been in the latter portion of May.

Q. Of 1965? A. 1965.

Q. Then from the Telephone Company you went where? A. To Union Electric.

Q. When would that have been? A. That should have been around June.

Q. Of '65? A. '65.

Q. Then from the Electric Company where did you go? A. We went back to Laclede Gas.

Q. When would that have been? A. About the four—about the latter portion of June.

Q. Of 19—— A. Of 1965.

Q. From there you went where? A. Back to Union Electric.

Q. That would have been when? A. That should have been about the 1st of July, July the 2nd of '65. And we also, during the same day we went to McDonnell.

Q. Were these demonstrations widely publicized in the [68] St. Louis metropolitan community? A. Some of them. Most of them were picket lines and there were also other types of non-violent type demonstrations.

Q. During all this protest demonstration of the utility companies and the other companies, was there ever any violence to persons? A. No.

Q. Any destruction of property of any kind? A. No, no.

Q. There was therefore no injury to person or property? A. No, absolutely not.

Q. At any time? A. No, no.

Q. All right. During this whole time that you have talked about from March or April 1965 through, until July of 1965, were you chairman of ACTION during that period of time? A. Yes.

Q. Did you ever have any protest demonstrations at any companies other than utilities? A. Yes.

Q. Which companies were these? A. C. W. Gates Real Estate Company, The Gateway National Bank, the Police Department, the——

Q. What I was trying to get at, the other companies, you [69] have testified to Continental Baking Company, you protested there, is that correct? A. Yes.

Q. When did that take place? A. That taken place I believe in '66, I think it is '66.

Q. 1966? Do you know what month that was in?

Mr. Foote: I object to any further testimony about any picketing that may have taken place after July 26, 1965. I don't believe it is relevant.

The Court: What do you say, Mr. Gilden?

Mr. Gilden: Well, I think if there were discriminatory practices at this company in 1966 and this discrimination had taken place even though it was in 1966 and incorporated past discrimination policies of this company, it could be incorporated in this lawsuit.

The Court: What does the picketing have to do with this lawsuit after the time he was laid off?

Mr. Gilden: I will let Your Honor rule on the matter.

The Court: I am asking you.

Mr. Gilden: Well, I believe that it would have nothing to do with the refusal to hire in July 1965, certainly.

Mr. Foote: As I understand the lawsuit, that is what it is all about, the refusal to hire, so Your Honor, I think it is irrelevant.

[70] The Court: I will sustain the objection.

Q. (By Mr. Gilden) Now did you also picket Krey Packing Company? A. Yes.

Q. When did that take place? A. That taken place in '66 also.

Q. That was in '66?

Mr. Foote: I make the same objection, Your Honor.

The Court: The same ruling.

Q. (By Mr. Gilden) Now while you were working in Department 958, that is the department in which you were the lab technician B, is that correct? A. That is right.

Q. Did you ever have any dealings with Mr. Godefroid in that department? A. Yes.

Q. When did you start having some dealings with him? A. Immediately after I was given the title of research and development technician. I was given a panel that was already started by someone else, and my job at that time was to finish the panel. It was a panel that had a num-

ber of wires that was routed and it had to be fabricated. And the wire bundle had many, many, many mistakes in it. However, Mr. Godefroid, you know, constantly informed me that I had to [71] hurry up and get rid of that, hurry up and finish this panel. I told him that while checking the panel and the routing of the wire it was impossible to push, for me to hurry up on the job because of the many mistakes. And he said, now you claim that you, you know, that you wanted to be a technician, you claimed to be a technician. Now we have to push and get this work out, you know. So every so many hours he kept coming back and he kept trying to check on the progress that I was making on the wire bundle. And I was constantly telling him of the many errors I had discovered. And he constantly pushed, hurry up, hurry up, hurry up, and so on and so forth. So finally he went and got someone else to come down and take a look at the panel, and I explained it to them, that person, I don't recall this person's name. However, after I had explained the many errors and showed it to this other person, the engineer, he was an engineer, I believe, he told me then to tear up the whole entire bundle and he wanted me to build the bundle all over.

Q. Did you do that then? A. I did that.

Q. Was that useful then? A. Absolutely.

Q. The package you prepared? A. Absolutely it was.

[72] Q. Did you know why he had given you this bundle that had some errors in it? A. I—At the time I didn't really know why, but I had suspicions. I didn't know the exact reason why.

Q. Do you know whether he was doing that with any other employee in your department? A. Not that I could——

Mr. Foote: Excuse me. I object to the form of the question. What do you mean by doing that?

Mr. Gilden: Well, giving these packaged components with errors in it for someone to work up like the one he had given you.

A. Not to my knowledge.

Mr. Gilden: All right.

Your Honor has ruled on the tax records here, and Mr. Green has stated he has them at home. Can I produce them, I believe the matter will be laid over until tomorrow morning, can I submit them to the Court at that time in evidence?

The Court: You can recall him to the witness stand and introduce them.

Mr. Gilden: For that purpose?

The Court: Yes.

Mr. Gilden: Thank you.

Your Honor, I have taken from the McDonnell file on [73] Percy Green, his personnel file, Exhibits 2 through 32, and I have showed these exhibits to Mr. Foote and they can be accepted.

Is that correct, Mr. Foote, as evidence in this matter?

I will offer them as evidence in this matter.

Mr. Foote: I have no objection to their being received in evidence, Your Honor.

The Court: Very well, they will be received.

Mr. Gilden: Your Honor, I have finished my direct examination.

The Court: Cross-examine.

Cross-Examination, by Mr. Foote

Q. Mr. Green, referring to your testimony about your first request for transfer into Department 958, I believe

you testified you had a conversation with Mr. Sinecki, is that right? A. That is right.

Q. There was some discussion about the tinted glasses you were wearing? A. That is right.

Q. Is it true, Mr. Green, that during the discussion Mr. Sinecki informed you that the work in the department was of [74] a very close and detailed nature and that the reason for his inquiry about your dark glasses was as to whether or not they would get in the way of your performing that work? A. No.

Q. Do you have any recollection at all of any discussion about the detailed nature of the work in connection with your dark glasses? A. Yes. Because Mr. Sinecki seen the type of work I was doing prior to me coming over into the department and the nature of the work in the department that I was in was very, very little different in the department that he was in charge of.

Q. Isn't it true that he mentioned to you that the reason for his question about the dark glasses was because of the detailed nature in the lab, the detailed nature of the work there? Don't you remember him saying that to you? A. I don't recall the—he might have but I don't recall it.

Q. You do remember the discussion about the dark glasses? A. I remember about the glasses, about the beard, about the way I was dressed and so on and so forth.

Q. Turning to the discussion about the form of dress, the lab is separate, physically apart from the production part of the plant, isn't it? A. At that particular time it wasn't necessarily—they [75] had portions of the lab that was part of production, you see it was intermingling the peoples.

Q. I understand that but it was physically located by itself, separate from most of the production facilities? A. Most of it, yes.

Q. And the people in that lab worked for this specific department, E.E.D., as you have identified it, is that correct? A. Yes.

Q. And those people were often visited, is it not correct, by people from the outside, that is sales people, Government people and so forth? A. Well, the whole entire E.E.D. was visited.

Q. That is right. When Mr. Sinecki mentioned dress to you he gave as his reason that there were outside visitors and they expected the dress to be less casual than it was in the plant for this reason, did he not? A. Yes, but——

Q. My question is just what he said to you. Did he not say it was because of the visitors they expected a little different kind of dress? A. Yes.

Q. Isn't it a fact? A. Yes.

Q. Isn't it also a fact that the dress worn by other [76] people in the E.E.D. was different from that worn in the plant as a general thing, is that not true? A. Partly.

Q. Isn't it also true that the young ladies who worked in the E.E.D. were requested not to wear slacks or shorts but rather were requested to wear dresses or skirts, which was different from the rules and regulations for ladieswear out in the plant, isn't that true, Mr. Green? A. I don't recall that. If you mean the office personnel, yes. But if you are meaning person who were working at the bench, that was not true; that is not true.

Q. I am not talking about the union representatives who were assigned to E.E.D. but the technicians? A. The female technicians?

Q. That is correct. Do you remember their dress? A. The only dress that I recall of any female technician, they were wearing pants. I don't recall any of them wearing dresses.

Q. Do you recall whether the person you are thinking of was a technician or a member of the union? A. In fact I

am trying to remember as to whether I recall any female technicians.

Q. There were female employees in the E.E.D., were there not? [77] A. Yes, it was, in the production end of it.

Q. Now in the discussion of the layoff, I believe you testified that Mr. Sinecki told you in this first interview that there was a good chance of people being laid off in the E.E.D., isn't that right? A. He told me in a threatening fashion.

Mr. Foote: I object to that answer and move that it be stricken from the record as not responsive and volunteering information.

The Court: Answer the questions, Mr. Green.

The Witness: What was the question again?

Q. (By Mr. Foote) The question was whether he told you that there was a good chance that there would be a layoff of personnel of the E.E.D.? That is what you testified, isn't it? That he told you that? A. Yes.

Q. That there was a good possibility of there being layoffs? A. A very, very good possibility.

Q. That's right. He also told you, in fact gave you a specific instance of someone whom he knew who was transferred into E.E.D. and was shortly thereafter laid off, isn't that true? A. Yes. That was an example that he gave.

[78] Q. That's right. Did he explain to you what work was being done at that time, that is in 1962, your first request, in the E.E.D.? A. No.

Q. Did you know what work was being done in general? A. In general.

Q. What was being done? A. In 1962?

Q. Yes, sir. A. It was the developing—it was the development of an electronic company to do nothing but

electronic equipment. It was supposed to be bidding on independent projects of various electronic equipment.

Q. The actual work that the department was doing was what? Was it building something, ground support? A. Yes. Ground support. It was ground support equipment plus, you know, I can't say that I know all of what was being done but basically they were doing most of the ground support equipment for the FOH Phantom.

Q. After this conversation with Mr. Sinecki where he told you of the high chance of a layoff and he told you that the work that was being done was pretty routine and so forth, is it not true that you decided not to apply for the job? A. Well, I can't say that I decided without certain [79] things.

Q. I am not asking you how you decided, Mr. Green. The question, I think, can be answered yes or no. The question was whether you decided yourself to withdraw the application and not apply for Department 958? Is that not true? A. Well, I was frightened.

Mr. Foote: I object to that answer and I move that it be stricken as not responsive to the question.

A. What answer do you want me to give?

Q. The question was whether you, yourself, decided not to apply to 958 after Mr. Sinecki's conversation in 1962? A. Well, I had no other choice.

Mr. Foote: I object to that answer.

A. Yes, yes.

Q. You decided, didn't you, Mr. Green, didn't you say, look, I'm not going to apply here after all, when you learned there was a good chance of a layoff? A. No, that was not how I determined, that is not how I made that decision.

Q. I didn't ask you how you made the decision, my question was what was the decision? Is it not true that you decided? A. The decision was——

Q. Excuse me, sir. Let me finish my question. [80] A. OK.

Q. The question was whether you decided yourself to take your name out of the hat for 958 in 1962? In other words, isn't it a fact that you decided yourself not to apply for that job after you learned of the possibility of a layoff? A. I don't understand the question. I later decided to not—I decided to take my name out of the——

Q. (Interrupting) That was the question, you understood it. A. (Continuing) ——but not because——

Q. I didn't ask you why. A. I mean you just gave me a reason why.

Q. The question is was it not after you talked to Mr. Sinecki and learned of the layoffs and had this conversation with him, was it not after that that you personally decided yourself to take your name out of the running? A. It wasn't after I learned of the layoff. You see, this is what I am saying. I taken my name out of the hat because of other reasons.

Q. It was your decision though, wasn't it? A. That is right. But it wasn't because I learned of the layoff possibility.

Q. The question was, was it not after you had your conversation with Mr. Sinecki that you personally decided not [81] to apply for this job? A. That is better; yes.

Q. So you remained a member of the union? A. That is right.

Q. The I.A.M., Machinists District 9? A. That is right.

Q. Then some time later, approximately a year as I remember your testimony, you reapplied? A. Reapplied.

Q. For Department 958? A. That is right. It could have been like 958 or 948.

Q. Well—— A. I don't know which.

Q. Whatever the department was it was E.E.D.? A. OK.

Q. We will call it the E.E.D. A. OK.

Q. At the time you reapplied did you know what kind of work the E.E.D. was doing then? A. That is right. The same as it was when I first applied.

Q. Were they building the Gemini simulator, was that part of their work, was that their work or part of it? A. That was part of it.

[82] Q. You knew, did you not, that the Gemini simulator was a project to be completed sometime in the fairly near future, didn't you? A. No, I didn't know in the near future but I did know that they were—I didn't know how long it was going to take, but I did know that it was being built along with other equipment.

Q. But you did know, did you not, that the Gemini was not a continuing production item, that it was a one-shot affair and it was for the Gemini Project and that was it, did you not? A. No, I knew that at McDonnell there is no sustained project ever.

Q. My question, Mr. Green, excuse me, the question was about Gemini only. McDonnell is a big place. We are talking about the Gemini simulator project. Isn't it a fact that when you went and applied again to get into E.E.D. you knew that Gemini was a one-shot affair? A. No, I didn't know that.

Q. All right, sir. After you requested a second time to move into E.E.D. you had another conversation with Mr. Sinecki, didn't you? A. That's right.

Q. During the second conversation Mr. Sinecki told you again that there was a good chance that people would be laid [83] off, didn't he? A. I had a good chance that I would be laid off.

Q. Mr. Green, my question was people would be laid off. That can be answered yes or no, he didn't say that. A. OK. Yes or no. I mean he didn't say that.

Q. Are you saying that he did not tell you that there was a good chance that people would be laid off? A. As I remember he told me that there was a good chance that I would be laid off.

Q. This was during the interview when you were requesting to come into the department, isn't that right? A. That is right.

Q. You knew at the time of this interview and at the time of your request that employees in Department 958 or the E.E.D., were what is known as free enterprise employees, didn't you? A. No, I didn't.

Q. Employees who who were not union members? A. Oh. OK.

Q. As distinguished from union members. A. Yes, sir.

Q. And at the time you made the second request you had seven or eight years seniority in the union, didn't you? A. Seven years, yes.

[84] Q. During the conversation with Mr. Sinecki there was some discussion about loss of seniority, wasn't there? A. Yes, that's right.

Q. You knew at the time, and Mr. Sinecki told you if you came into E.E.D. you would lose your union seniority, didn't he? A. I knew that before Mr. Sinecki ever even asked me about it.

Q. You knew it when you went in to see him? A. That's right.

Q. That you would lose it? A. That is right.

Q. This is also one of the things that he told you, is that not correct? A. Yes.

Q. That you would lose your union seniority? A. The point was I already knew that. I have been around that well.

Q. I understand that. The question was what Mr. Sinecki said. A. OK.

Q. He told you that you could lose your union seniority and you also discussed that there was a possibility that you could be laid off, isn't that right? [85] A. That is right.

Q. What was the exact description of your job title when you were assigned to the E.E.D.? Was it technician B? A. Yes.

Q. Technician Grade B? A. Yes. It was research development technician B.

Q. There were other technicians in the department that were called technicians Grade A, were there not? A. Yes.

Q. When you were transferred will you tell the Court exactly what kind of work you were doing? What kind of work was it? What physically did you do after you were transferred? A. After I was transferred from——

Q. To the E.E.D.? A. To E.E.D.? I was fabricating panels. I was wiring up panels for the Gemini simulator.

Q. Were you also building wire bundles? A. Yes, sir. I mean it was a panel and then I had a layout, a wire layout, or something similar to a blueprint, where I had to cut various lengths of wire and wire it and, you know, just build it from scratch from the panel.

Q. Um hum. Build it from scratch from the panel? In other words, by the time you were through it was a wire bundle? [86] A. That is right.

Q. That is the kind of work—— A. (Interrupting) That is the kind of work it was, however, the project that I was put on immediately after I was given the classification was a panel that had already been started.

Q. That is right, somebody else had made a mistake? A. That's right, there was many, many mistakes, multiple mistakes; it was a shod job.

Q. But after that job that you testified to this afternoon, then the bulk of your work was building electrical panels, putting together wire cables, and connecting them in the right place, is that right? A. That is right. That was the bulk of my work.

Q. There was, however, in addition to that some testing work you were doing, isn't that right? A. Yes, very, very little.

Q. I understand that is your recollection, but there was some testing work, was there not? A. Yes.

Q. You were given the work to test these bundles and whatever else after they were put together, is that what testing work means? A. No. Not in the sense that I understand testing.

[87] Q. Would you describe what kind of testing work you did? A. The type of testing work I was speaking of was the type whereby one would troubleshoot a circuit.

Q. Um hum? A. To determine whether or not it is a functionable circuit.

Q. Uh hum? A. I was given some Micky Mouse testing.

Q. What does that mean? A. Taking continuity checks, you know, to see whether or not a wire over here is properly routed over there. You have a little battery, a continuity checker, where you put the test at one end of the wire and you fish around until the battery light lights up, you know.

Q. Was this testing which was required to be done in connection with your assignments in the E.E.D., that is with building the Gemini or whatever? A. Yes, continuity checks.

Q. This was testing which was part of the work being done in that lab, is that correct? A. Yes, but it is the very lowest grade of testing.

Q. Have you described fully all of the kind of work that you were assigned when you were in E.E.D.? A. Yes, I, first of all I spent a great deal of time on [88] the simulator.

Q. Um hum? A. As it pertained to fabrication.

Q. Um hum? Let me interrupt you there if I may. I don't mean to stop your answer and we will continue with it. But while you were doing this work on the simulator is it not a fact that other lab technicians were also working on that simulator and doing similar work? A. Yes. Yes.

Q. Let's move on to the next assignment that you had. A. All right. The other assignment was at various intervals I was given, oh I guess, a stack of module cards, you know, printed circuit cards to check out.

Q. Um hum. This was testing work? A. This was testing work where you have power on the circuit board itself.

Q. How long did you stay in that assignment? A. Oh, I guess, you know, in all I would assume all the test work I conducted there, it could all be put in in about two weeks.

Q. I see. Now this testing work that you were doing, were there also other employees in the E.E.D. who were doing that, that is lab technicians Grade B who were doing the same kind of work while you were there? [89] A. There were some.

Q. There were some other employees who were doing identical work, similar or the same kind, not identical, because only you were doing that, but similar work, that is testing these circuits while you were doing it and while you were there, is that correct? A. Yes.

Q. All right, sir. What was the next assignment that you had in E.E.D.? A. The next assignment was—let's see. The next assignment was—ended up in a transfer. You see first of all I went into the third shift. Then after awhile I went back on days; then I was sent over to what was called the prototype lab layout.

Q. Were you the only one sent there, Mr. Green? A. No.

Q. How many others were sent there? A. How many other black ones?

Q. No. The question was how many other people? A. Oh. I can't recall but it was some.

Q. You asked me whether the question was how many other black ones. I understood your testimony to be that you were the only black man in the E.E.D., isn't that correct? A. That's right.

[90] Q. All right, sir. There were a number of other men sent over and they would have been white men from the E.E.D. at the time you were transferred, isn't that correct? A. That is right.

Q. What kind of work did you do there? A. Fabrication.

Q. Did these other white men who were sent over with you at this time do the same kind of work during this assignment? A. Yes.

Q. All right. After that assignment where were you sent? A. I was sent home. That is when the layoff came.

Q. I see. This was the work that carried you up to August 28th, the day you were laid off? A. That's right.

Q. Isn't it true, Mr. Green, looking back over your experience in the E.E.D. that each job that you were given was also being given to other technicians in the department? A. Not those technicians that had the type know-how——

Q. Mr. Green, wait a minute. The question was just the technicians, not your opinion of how qualified you were,

the question was just the other technicians in the department, is that not true? A. Restate that again.

[91] Q. The question was the work that you were given to do while you were in E.E.D. was work which was also assigned to other technicians in the department, isn't that a fact? The same kind of work? A. It was given to some technicians.

Q. All right. I didn't ask you how many. A. It wasn't given to all.

Q. I didn't say all. It was given to other technicians? A. It was given to some.

Q. That's right. It was given to other people who were lab B technicians, isn't that right? A. Yes, some.

Q. Was there any work in the department of a general kind, testing or fabrication or whatever, to your knowledge, looking back on it now, which was given to you only and which was not given to other lab technicians grade B? A. I have no way of knowing that.

Q. My question was to your knowledge. It can be answered no, you don't know. A. I don't have any knowledge.

Q. All right, sir. At the time that it was announced that you were going to be, and others were going to be laid off, it is true, is it not, that you were not the only one to be laid off? That was your testimony, wasn't it? [92] A. (No answer.)

Q. Didn't you say there were some eighteen others who were given the same announcement? A. I said I was the only black and then there were others.

Q. I understand that. You have testified to that several times and I think I understand it. But my question was, there were some other people in the department, in E.E.D., who were also told they were in the excess category, isn't that right? A. OK, that's right.

Q. They were white men, were they not? A. Oh, yes. By all means.

Q. At that time there was a conversation had about tests, is that right? A. Yes.

Q. Isn't it a fact that you were told that every opportunity was going to be made to place those eighteen men, you and the others, with the company in a different capacity, isn't that a fact? A. That certainly was stated.

Q. In connection with that placing is it not a fact that you and the others were told that a test was to be given to determine whether or not you were qualified to move to another grade? [93] A. No, that wasn't true. That wasn't the case. What we were told was that the test would be provided.

Q. All right, and the purpose of that test you were told also was to determine whether there was a possibility of finding you another place in the plant, isn't that right? A. No.

Q. You were not told why you were given the test? A. I was starting to tell you what I was told.

Q. All right, what were you told? A. I was told, we were told at that time——

Q. You say we? Everybody else including you? A. The other persons, the people that were slated for layoff.

Q. I see. A. The person stated that this is a test in order to help, to aid personnel in placing some of the—placing as many of the persons as possible in other departments.

Q. So—— A. (Continuing) However, this test is not mandatory, they made it plain and clear that you may or you may not take the test.

Q. Yes. A. (Continuing) But the point of the test was to aid in assisting in placement for those persons.

[94] Q. I see. So you were told that part of the information that was needed in order to aid in a transfer was this test, is that what you are saying? A. Right. This is right.

Q. This is part of the information? A. This is part of the information.

Q. Along with the other eighteen you were asked to take the test to aid in the transfer, aid in the information so that a transfer could be made, isn't that right? A. Well, I mean—Yes.

Q. That is what you were asked, this is the question. Weren't you asked this, to take the test to aid, to use your word, in getting information about the transfer? A. No. No. It wasn't run out like that though. The person stated that a test would be given to those persons who would like to take the test.

Q. I see. A. (Continuing) The purpose of the test would be to assist personnel in placing them elsewhere in the company.

Q. Um hum. A. (Continuing) I then raised the question that, and the person pointed out that the test was not mandatory.

Q. Correct. A. (Continuing) And I asked the person would it be held [95] against a person for not taking it and the person said no.

Q. You understood and were told that this was to assist the personnel department in facilitating the transfer, isn't that what you testified, sir? A. Yes.

Q. It was to assist them, I mean there is no secret about it? A. It was an aid, that is what they said.

Q. That is right. A. OK.

Q. They said it was an aid to them to find out whether or not there was a place to transfer you? A. That's what they said.

Q. You understood this at the time, didn't you? A. Yes. And there was something I said.

Q. You said what you said; now I am asking——

Mr. Gilden: I ask that counsel not limit the testimony here. Mr. Green can testify, he is testifying in response to these questions and counsel is limiting his testimony.

Mr. Foote: I think the question, Your Honor, was what Mr. Green was told, not what Mr. Green said. I think I have a right to ask him what he was told. That is what the question was.

The Court: You will have a chance to re-examine him, [96] Mr. Gilden.

Mr. Foote: Can I have the question back, please?

(Thereupon read by the reporter as follows: Q. "You understood this at the time didn't you?" A. "Yes. And there was something I said.")

Q. (By Mr. Foote) So the answer is to that question that is what they said, isn't that correct? A. Yes.

Q. On the basis that it was offered you refused to take the test, isn't that right? A. Yes, that's right.

Q. And you were subsequently laid off? A. Yes.

Q. And there were some other men who were laid off from E.E.D. at the same time, isn't that correct? A. Yes.

Q. Do you know how many? Do you remember? A. Something like eight, the papers state.

Q. They were all white men, were they? A. There wasn't any other black there.

Q. They were all white? A. So they had to be.

Q. Mr. Green, the work you were doing in E.E.D. before [97] you were laid off, as I understand your testimony, was not up to what you consider your qualifications, is that correct? A. Oh, yes, that is correct.

Q. It was not up to yours? A. No.

Q. Would you say, then, you were overqualified for the work that you were doing in E.E.D. at the time you were working there? A. I was overqualified. I was overqualified as pertains to that grade.

Q. I understand that. And this, as I understand your testimony, was the source of some dissatisfaction to you, namely the work you were being given was not up to what you were able to do, is that correct? A. Oh, no, it was no dissatisfaction as it pertained——

Q. There was dissatisfaction that you got this work assigned to you? A. Now wait a minute, let me finish.

Mr. Gilden: I would object to counsel cutting him off.

Mr. Foote: I didn't mean to cut him off. I want to hear his answer just as much as you do, sir. Excuse the interruption.

A. I was not dissatisfied as pertained to me, you know, [98] new coming into a department.

Q. (By Mr. Foote) Um hum. A. For a short time just to show that I can do the work.

Q. Um hum. A. It wasn't any dissatisfaction. Up until it dawned on me that I was being held into a department at this classification purposely to do this kind of menial work. And as a result I would certainly, you know, doing the lesser important work. I would certainly be the person set up to be cut off, you know. Now if I was going to be put there for thirty days or so on and so forth just to get warmed up, you know, to get warmed up, like a thirty-day grace or something like that, then I was going to be put into a department section where I would be doing the work that was related to the work I was doing prior to me coming into the department, then everything would have been beautiful.

Q. At the time you had this conversation with Mr. Sinecki before you got the job in E.E.D., it is true, is it not, that he told you the work was going to be of a routine nature and that it was going to be menial work, that is what you testified this morning isn't it? A. Yes. Yes.

Q. Let's move, Mr. Green, then to the subject of your demonstrations that you testified about this morning. There was [99] one demonstration that you participated in during the fall of 1964 that you did not mention this morning, wasn't there? A. The fall of 1964? I don't know whether I was asked about the fall of '64.

Q. I will hand you, Mr. Green, what has been marked Plaintiff's Exhibit 1, which is your application for employment and ask you on this page here, which appears to be the first page, whether or not you put an X in the box as to the question whether you have ever been arrested for any reason other than a minor traffic violation. Did you put an X there? A. Yes. Let's see, I don't know whether I put that X there or not. Let me check it out.

Q. All right. A. I don't recall whether or not I put that X there or not.

Q. Look right beneath the X, there is written in the same box concerning arrests the years 1963, 1964, 1965, and after that is written Civil Rights demonstrations, St. Louis, Missouri, is that in your handwriting? A. Yes, it appears to be.

Q. What were you arrested for in the fall of 1964 that you were referring to in this application? A. The fall of 1964? It must have been—fall of 1964. It must have been obstructing traffic, a charge of obstructing [100] traffic.

Q. That would have been in October, late October, 1964, do you remember? A. Possibly.

Q. At that time you were chairman of the Employment Committee of CORE, weren't you? A. That is right.

Q. And the job of the Employment Committee was to investigate and to demonstrate against alleged employment discrimination, was it not? A. No, that is incorrect.

Q. What was the job of the Employment Committee of CORE at the time you were chairman of it? A. The job of the Employment Committee was to investigate, negotiate and file complaints.

Q. About employment discrimination? A. Right. Against blacks.

Q. While you were chairman of the Employment Committee, CORE voted to take what was referred to as "direct action" against McDonnell-Douglas, didn't it? That is McDonnell Aircraft Corporation? A. Non-violent action.

Q. It was direct action that was the vote taken by CORE? A. Direct non-violent action, yes.

[101] Q. All right, sir. And at the time of this vote you were still chairman of the Employment Committee, weren't you? A. Yes.

Q. This direct action was to take several forms, was it not? A. I'm not sure. I don't know what form you have reference to.

Q. Well, specifically the direct action was to include a plan to stall certain cars in the vicinity of the McDonnell-Douglas, was it not? A. I think that that was part of it, yes.

Q. In connection with that plan certain studies were made about strategies and tactics and how the plan would be put into effect, isn't that right? A. I don't know anything about that, because that is not in my department.

Q. It is true, isn't it? A. I was employment chairman, you are speaking of some other——

Q. It is true, though, that during that planning, you personally were asked some questions about strategy, isn't that right? A. Oh, I was asked some questions.

Q. What were you asked? [102] A. I was asked——

Q. Do you recall or don't you? I thought you said you didn't recall. A. Well, I don't. I was just trying to think of possibly some questions that I might have been asked.

Q. But they were questions about strategy regarding this direct action that had been voted by CORE, isn't that right? A. Not strategy, though. You see the term you use, strategy would be misleading.

Q. Now wait a second. Are you saying that you were never questioned about strategy? A. I was asked various —I was asked questions.

Q. And it was about strategy? A. Concerning McDonnell.

Q. And you were also asked questions—— A. (Interrupting) I wasn't the person——

Q. Wait a minute. Unless you have more to that answer, let's take them one at a time. A. OK.

Q. You were also asked questions, were you not, about the strategy for the so-called direct action, isn't that right? A. No, I wasn't asked any questions about, as I can recall. I was asked various questions as it pertained to, you know, pertaining to McDonnell.

[103] Q. These were questions—— A. (Continuing) What did I think, what repercussion did it have upon myself.

Q. I see. A. Or what-not, you know, would I participate and so on and so forth.

Q. And you decided to participate? A. Well, I was hard core unemployed.

Q. I understand; but my question was, you did decide to participate? A. Oh, yes. Yes.

Q. Is it your testimony that at this time you were unemployed? A. At this time? October '64?

Q. Um hum. A. Oh, yes. From September, August 28th, '64, for that whole entire year, employment was down in the city.

Q. Who at CORE devised this plan of action which was to lead to stalling cars out at McDonnell, was there a committee assigned to that? A. Oh, yes. There was a Strategy Committee, I believe.

Q. Was a plan—— A. (Continuing) Formulated.

Q. Was a plan subsequently devised to stall cars out at [104] McDonnell? A. Yes, I think it was.

Q. Was that plan, to the best of your knowledge, reduced to writing? A. Yes.

Q. What was the writing, do you remember, what was the document? A. No, I don't recall. I can't—I don't quite remember.

Q. You were given a copy of the document before the time for stalling cars, weren't you? A. Was I given one?

Q. Yes. A. Yes.

Q. This was a document which had a page of instructions plus a diagram, isn't that right? Do you recall? A. I think that is true, yes.

Q. And you saw this document before October 31st, 1964, the date of the stall-in, is that right? A. I believe so. It is chances that I seen some portions of it a day or so before, something like that.

Mr. Foote: Will you please mark this Defendant's Exhibit A.

(Thereupon, the document above referred to was marked by the reporter for identification as Defendant's Exhibit A.)

[105] Q. (By Mr. Foote) Mr. Green, I will hand you what has been marked Defendant's Exhibit A for identification, which is three or four documents stapled together with the legend "Team II" on the outside. Can you identify that, sir? A. Um hum. Yes. This looks like, similar to what was picked up by the——

Q. The question is whether you can identify it. Is this the plan as reduced to writing, drawn up by CORE, of which you had a copy you already testified to? A. Yes.

Q. That is a copy of it? A. It looks like it, the best I could tell; it is a bad copy.

Q. On the first page it says Team No. II. Do you recall under the plan was that referred to? A. I sure don't.

Q. Were there several teams of cars that were supposed to participate in this demonstration? A. I don't really recall.

Q. You don't recall whether there were more than one team of cars that were to participate in the stall-in? A. There was some volunteers that was—let's see. Some people was asked to volunteer.

Q. Um hum. [106] A. Exactly how many cars they were, a person that was involved, I don't know. I only know of, let's see, maybe myself was in one car and maybe someone else, I don't know, about one or two cars, I guess.

Q. You read this plan which is Defendant's Exhibit No. A, or letter A before the stall-in, didn't you? A. Not really. I didn't really pay that much attention to it.

Q. Is it your testimony that you did not read a copy of Defendant's A? A. I said I didn't pay that much attention to it.

Q. The question was, excuse me, the question is whether you read it? Do you recall reading these instructions before the stall-in? A. I can't recall that I actually read them or anything, you know, in detail.

Q. Do you recall, not in detail, I am not asking about your recollection now, but I am asking you whether you remember or do you remember that you did not read these instructions before the stall-in? A. Well, I am saying that, you know, the time of the stall-in, the day of the stall-in was when these things were, you know, distributed.

Q. The question was whether before the stall-in you had [107] read these instructions? A. Well, I can't say that I did.

Q. You don't deny that you did? A. I just don't recall.

Q. You just don't recall? A. I don't recall that I did.

Q. You had had certain instructions on what to do and where to go, hadn't you, from the people who were planning this demonstration? A. No, not until the——

Q. The question was not when, sir, but whether you had them. A. Oh, OK.

Q. Were you instructed what to do under this plan? A. Well, yes, OK.

Q. Wasn't part of the plan to assemble at Natural Bridge and Fair at about 5:00 a.m.? A. Yes.

Q. And that people did assemble there? A. That was part of it, yeah.

Q. And there were several teams, specifically five teams, that were part of the demonstration, isn't that right? A. No.

Q. You don't recall? [108] A. I don't recall that.

Q. There was more than just your car, do you remember that? A. Yes.

Q. Do you recall that Team I was to go to Bridgeton Station Road north of Natural Bridge? A. No.

Q. Does that ring a bell? A. No.

Q. Is Bridgeton Station Road an access road for McDonnell employees coming to work, do you know? A. I don't recall.

Q. Do you recall that Team II was to go to Lindbergh Boulevard and the Brown Road intersection? Do you remember that instruction? A. Brown Road, yes, that was my—that was the car I was in.

Q. Lindbergh Boulevard and Brown Road? A. Lindbergh, oh, no, no. Let's see. Mine was Highway 70.

Q. I see. Do you recall that there was a second team that was supposed to go to Lindbergh Boulevard and Brown Road? A. I don't recall that.

Q. You know, don't you, that Brown Road is an access road to McDonnell for employees that come to work on it? [109] A. What, Brown Road?

Q. Yes. A. It is an access to many industries out there.

Q. The question is whether it is an access to McDonnell? A. Partly.

Q. It is an access to McDonnell, isn't it an access road? A. Yes.

Q. How did you get to work when you were employed there? What road did you usually follow? A. Oh, I usually sometimes traveled 70 over to Lindbergh and come in.

Q. On what road? A. 70 to Lindbergh and come in, what is that, Lindbergh?

Q. Um hum. A. To, what is it, Airport Road?

Q. Um hum. A. Some road through there.

Q. Airport Road is another road which is an access road to McDonnell? A. Yes, I believe so. Then there was another road called Banshee Road. I don't recall exactly which is which.

Q. Um hum. A. But when I was transferred to E.E.D. I was using Brown Road sometimes also.

[110] Q. OK. There was a third team that was supposed to go to Frost Avenue and the Graham Road intersection. Do you remember that instruction? A. I am not hep to that, no.

Q. I beg your pardon? A. I'm not aware of that.

Q. You don't remember talking about it, a third team with those instructions? A. No.

Q. There was a fourth team that was supposed to go to Airport Road one hundred yards east of Graham Road, do you remember those instructions? A. No.

Q. There was a fifth team that was supposed to go to Brown Road about fifty yards north of Highway 70? A. That was the one I am speaking of.

Q. That was you? A. That was me.

Q. That was your part of the plan? A. No, it wasn't my part of the plan.

Q. That is what you were to do under the plan? A. No. It wasn't what I was supposed to do under the plan.

Q. What were you to do? A. I was participating with those people.

[111] Q. Um hum. These other four teams? A. No. No. With that Highway 70, over Highway 70 onto Brown Road.

Q. What were your instructions under the plan? What were you told to do? A. Well, the—the point was to stop, you know, to stop cars there.

Q. OK. Let's take it a step at a time. You were to go to the key point, were you not? That is at Natural Bridge and Fair, isn't that right? A. Well, Natural Bridge and Fair was the assembly point.

Q. That was the assembly point. What was the key point? You make a distinction, I note. A. I don't know. I don't see once again, since I didn't have anything to do with the writing, I don't know what you are saying there about key points.

Q. The question was just whether it was a specific plan—— A. (Interrupting) It was an assembly point. It

was, you know, a point where persons that wanted to volunteer together, you know.

Q. Isn't it true, Mr. Green, that the instructions for each one of these teams, or at least specifically your team, was first of all to stop the car at the key point, isn't that true? A. I don't recall.

[112] Q. The car—— A. And I——

Q. Excuse me? You don't recall? A. I don't recall about stopping it at no key point.

Q. All right. A. The only thing I recall is that we stopped cars.

Q. OK. A. Right there in the middle of——

Q. And that the cars should be lined up next to each other when stopped. Do you remember that? A. No.

Q. Do you remember that the instructions were to cut wheels toward the center line? A. No. I notice that is on the diagram.

Q. I am asking your own memory now, what you remember of your instructions? And that the engine was to be turned off with the parking lights on, do you remember that? A. No, I don't remember that.

Q. Is it your testimony that you have no recollection at all about any of these instructions for this stall-in, Mr. Green? A. I have a vague recollection inasmuch as I was refreshed after looking at it, the diagram, I don't remember, but as far as that happening, as far as all of those persons at those points and everything, I don't remember.

[113] Q. When you read this exhibit, this document marked Defendants Exhibit A, it did refresh your recollection about what the instructions were, did it? Is that what you are saying? A. It refreshed my recollection as it pertained to, you know, what I know about the incident.

Q. What you were told about what the instructions

were? A. I don't recall what I was told, you know, because there was so many persons that was saying various things on that particular date, so I can't recall. I remember a person named—well, I can't even recall names of persons other than by nicknames.

Q. Mr. Green, you subsequently stopped your car on Brown Road, did you not? A. Yes, I did.

Q. You don't deny—— A. No, no.

Q. ——here today that you did that? A. No, absolutely not.

Q. You don't deny that when you stopped your car on Brown Road it was under the general plan that had been adopted by CORE, you don't deny that, do you? A. It was under the general plan that was adopted, you know, to protest.

Q. I understand. But it was the plan which was adopted by [114] CORE which you have already testified is generalized here in Exhibit A? A. Yes.

Q. In Defendant's Exhibit A? A. OK.

Q. There is no question about that, is there? A. No.

Q. You were then to put on an emergency brake, isn't that the instruction? A. Well, like I said I am not well aware of that. All I can tell you is about what happened to the car.

Q. This is a different question, I'm asking another question. Weren't you instructed to put on your emergency brake? A. Well, I don't recall having that instruction.

Q. But you were instructed to raise all the windows and lock the doors, weren't you? A. I don't recall that.

Q. And remain in the car until a policeman arrived? A. I don't recall.

Q. You were instructed that? A. I don't recall that. That perhaps could very well have been on that sheet but I don't recall no drill instructions or anything of this

nature where someone just told us that. It was just the point for persons that were to volunteer, if they didn't [115] know how or if they didn't know what to do or whatever else, I assume they was supposed to follow.

Q. They were given these instructions? A. I would assume that is the reason.

Q. Do you remember what the time of the stall-in was to have been? A. No.

Q. You have no independent recollection, Mr. Green? A. What time it was?

Q. How long the stall-in was to last? That is the question, how long was it to last? A. Oh. Uh——

Q. Isn't it true that it was to last an hour? A. I believe that document had something like that on it.

Q. I am asking you of your own recollection. Don't you remember that the stall-in was to last about an hour? A. No, I don't.

Q. You don't remember anything about such an instruction as this? A. No.

Q. An instruction to this effect? A. I vaguely remember something on that document that might have something to the effect of an hour.

Q. OK. [116] A. But the—on that morning some of us, especially some of the persons in the car that I was in——

Q. Mr. Green, are you answering my last question? I don't want to stop you if you are. My question was—— A. (Interrupting) What was your question again?

Q. My question was how long the stall-in was to last? A. Oh, it was supposed to last until a policeman comes up there.

Q. And if it took an hour for the policeman to get there, it would last an hour, isn't that right? A. Well, I don't recall that.

Q. Were you what was known as a team leader in this demonstration? A. No.

Q. Were you assigned to a team as such? Were you ever told that this was your team? A. No. The group that morning, it wasn't as orderly as perhaps it is outlined there.

Q. This is a very organized sheet, I agree with you. Are you saying that the plan did not go into effect step by step the way this sheet has it? A. That's right. I am saying whatever plan you are speaking of or what-not, it certainly wasn't as, you know, as that is supposed to be laid out.

[117] Q. Was part of the plan to stall the police as long as possible, trying to reach the goal of one hour? A. Like I said, I don't recall.

Q. You don't recall that either? A. I don't recall.

Q. If the police say you are under arrest, if the police should have said that, were you instructed to do anything at that time? A. I don't know. I know what I did when I was arrested.

Q. I didn't ask you what you did. We will get to that. A. I don't know. I don't know.

Q. You don't remember anything about instructions when the police came, is that right? A. No.

Q. OK. Do you remember any instructions on what to do if you were told, drive on or be arrested. Do you remember anything like that? A. No.

Q. Do you remember what you were told to do, if anything, should it happen that the police might threaten to call a tow-truck? A. No.

Q. Do you remember that? A. No.

[118] Q. Do you remember anything about that? A. No.

Q. Do you remember seeing these diagrams which are attached to the second page? A. I remember——

Q. Excuse me, let me finish the question, please. A. OK.

Q. Do you remember seeing the diagrams which are attached at pages 3 and 4 of what has been marked as Defendant's Exhibit A? A. 3 and 4?

Q. Yes. A. Yes. I remember seeing the whole entire book.

Q. As a matter of fact, Mr. Green, on page 3 of Defendant's Exhibit A, there is somebody's handwriting, is there not? A. Um hum.

Q. It says "Direction sheet"? A. Yes.

Q. That is your handwriting, is it not? A. I don't know, I'm not sure.

Q. Take a look at it very carefully and tell me whether or not that is your handwriting? A. I can't tell you that because—It looks like——

[119] Q. It looks very similar? A. It looks similar, but I can't say it is mine.

Q. You don't remember putting that on? A. Not to my recollection. It is possible. It is possible.

Q. You are not denying that is your handwriting, are you? A. I am not admitting that it is either.

Q. But it looks similar to yours? A. It could be. It could pass, you know, I guess.

Q. It looks similar to it? A. You know, like I said, it favors my handwriting.

Q. OK. So on the morning of October 31st, 1964, you did in fact drive your car on Brown Road, isn't that true? A. Yes, I did in fact participate in the protest demonstration.

Q. Wait a minute. I think you can answer that question yes or no, and I am not interested in your volunteer answers and I am not interested in your opinions of why the demonstration was taking place. I think the question can

be answered yes or no. You did drive your Carmen Ghia on Brown Road, did you not? A. I did.

Q. And there were two other people in the car with you, is that right? A. That is right.

Q. This was approximately 7:00 a.m., wasn't it, or there-
[120] abouts, or maybe before? A. It was about that time.

Q. And this was during the rush hour at the shift change, wasn't it? When the shift comes to work? A. Well the first shift for a number of the industry around there come to work about that time.

Q. Right. Including McDonnell-Douglas, right? A. Including McDonnell, yes.

Q. In fact that shift starts, the first one, when? A. I don't recall.

Q. You don't recall when you went to work on the first shift? A. When?

Q. When you were working—— A. (Interrupting) When I was working there?

Q. Yes, sir. A. When I was working there, let's see, the hours, I believe, was 8:00, or 7:30, or when I was changed after I got the change in position or what-not——

Q. Isn't it true, Mr. Green, that at the time you were working at McDonnell the first shift came to work at approximately 7:30 in the morning, the vast majority of the employees, including you? A. Between 7:00, I guess between 7:00 and 7:30.

[121] Q. While you were working at McDonnell were you aware that there was a great traffic problem getting to work and away from work, didn't you get caught up in that traffic jam a number of times, in fact every day when you worked on the first shift? A. Oh, yes. Yes.

Q. And that 7:00 a.m. time that you were driving on Brown Road on October 31st, 1964, was at the peak or

near the peak of the rush hour traffic, wasn't it? A. It was already a traffic jam.

Q. There were a tremendous number of cars up and down Brown Road in front of you and behind you, isn't that true? A. No, not really. Not in actuality. On the morning of this stall-in, you mean?

Q. I am talking about the number of cars on the road while you were driving down Brown Road. Isn't it true it was about bumper to bumper all the way as far as you could see in either direction? A. No. No.

Q. That is not true? A. No.

Q. There were a number of cars behind you, though, weren't there? A. Oh, it was a few cars behind us, but I can't say that it was just bumper to bumper that morning. It was not, because [122] the State Patrol was—the morning of this event we were already aware of the fact that——

Q. (Interrupting) Mr. Green, I am going to have to object to your answer as not responsive to my question. A. I think it indicates why there wasn't that much traffic on the road.

Q. You may think so, sir, but that was not my question. You will have an opportunity to answer whatever questions your own counsel may wish to ask. A. I'm sorry.

Q. At the time you were driving——

Mr. Gilden: I object to the comment of counsel.

The Court: Well, I think we will get along better, Mr. Green, if you will answer the questions.

The Witness: OK.

The Court: You answer his questions. When your lawyer gets ready he can ask you questions then you can get along better.

The Witness: OK.

Q. (By Mr. Foote) At the time of this drive you took on Brown Road, your car was in good running order, was it not? A. Yes, it was in fair shape. It was in pretty good shape.

Q. It was running OK, wasn't it? A. Yes. It would start.

[123] Q. I beg your pardon? A. I say it would start. You know.

Q. It was running all right, OK. Then while you were driving down Brown Road you stopped your car on the road, didn't you? A. Yes.

Q. And at the time you stopped it there was nothing wrong with the car that you know of, isn't that a fact? A. That is right.

Q. In other words, as far as you know, it didn't break down, you stopped it on purpose, isn't that true? A. I just answered that.

Q. Well, could you answer it again, please? A. All right.

Q. That is true, isn't it? A. That is true.

Q. And the cars behind you had to stop, however many there were, isn't that right? A. Yes.

Q. By stopping—— A. (Interrupting) The most of them.

Q. I beg your pardon? A. But they went around, you know. It wasn't that they just stopped. I mean they stopped for awhile then they went around.

[124] Q. All right. But they had to stop because your car was stopped on the road, isn't that right? A. That is right.

Q. It was on the road, wasn't it? A. Yes.

Q. You didn't attempt to take it off the road? A. No.

Q. When you stopped? A. No, not at that time.

Q. The whole idea was to stop it on the road and obstruct traffic? A. No. The whole idea was to protest.

Q. I understand it was a protest, that is very clear. But the means of the protest was to stall your car on the road and stop traffic, wasn't it? A. OK.

Q. That was the plan, wasn't it? A. Just to stop the car there.

Q. Well you knew the effect of it was to stall cars, isn't that right? A. OK.

Q. All right. That is true? A. OK.

Q. I am asking you, this was part of the plan, wasn't it? [125] A. All right.

Q. Yes or no? A. That is what was done.

Q. OK, that is what was done, that is what I am asking. I am not asking it very well but that was what was done, isn't that right? A. OK.

Q. The police came shortly, isn't that true? A. State Troopers.

Q. State Troopers came and if a State Trooper asked you to move your car, isn't that right? A. That's right.

Q. And you refused to do so, isn't that right? A. Yes. We told him why.

Q. You told him the reason you were not moving your car is that you were protesting against McDonnell-Douglas, isn't that true? A. Yes.

Q. You told him that? A. I don't know whether I did or some person in the car; there was two other persons in the car.

Q. But that was the reason you weren't moving the car, isn't that true? A. Yes.

[126] Q. And you did not move the car voluntarily, did you? A. No.

Q. You left it parked there on the road and somebody else had to move it, isn't that right? A. Yes.

Q. And you were subsequently arrested for obstructing traffic? A. That is right.

Q. At the time you were arrested you had been acting and obstructing traffic under the plan that was devised by CORE? A. I participated in it.

Q. I think my question was meant to be that you were acting under that plan, I didn't say you necessarily devised the plan, but this was part of the plan when you were arrested, isn't that true? A. OK. If you still want to call it a plan, OK.

Q. At first you entered a plea of innocence, didn't you, to that charge of obstructing traffic?

Mr. Gilden: I object to that; that has no pertinence in this lawsuit.

The Court: Overruled.

Q. (By Mr. Foote) Is that not true, sir? A. What was that again?

Q. You first entered a plea of innocent to the charge——
[127] A. I pled not guilty.

Q. Not guilty? A. Yes, that's right.

Q. And later through your attorney Mr. Curtis you changed your plea to guilty, isn't that true? A. Yes. I guess that was the case. It is so far back I don't recall.

Q. And you were convicted and fined upon the charge of obstructing traffic, isn't that right? A. That is right.

The Court: We will take a short recess.

(Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Q. (By Mr. Foote) Mr. Green, one question about the layoffs that I forgot to ask you. Isn't it true that before

the time that you and the other people were laid off in August there was another layoff in the E.E.D.? A. Yes.

Q. That was sometime in the spring of 1964? A. I believe it was. It was prior to the time that I was—that the other group was laid off.

Q. Do you happen to know about how many men were laid off at that time? [128] A. Approximately six, I believe it was.

Q. On July 2nd, 1965, there was a demonstration, you testified, before Union Electric and the Roberts Building in downtown St. Louis, is that correct? A. That is right.

Q. At the time of that demonstration by ACTION you held the highest office in ACTION, which was chairman, is that right? A. That is right.

Q. Now the Roberts Building housed a number of employees of McDonnell Aircraft Company at that time, isn't that true? A. That is true.

Q. And you knew that? A. That is right.

Q. There were some fifteen or sixteen ACTION members in the demonstration, right? A. Yes, I recognize that.

Q. And you were in charge of the picket line, weren't you? A. Yes, I was in charge of the picket line, yes.

Q. You arrived downtown at Union Electric around 4:00 o'clock in the afternoon or thereabouts? A. That is right.

Q. And the picketing began at Union Electric, is that right? A. That is right.

[129] Q. Shortly thereafter a number of pickets went over to the Roberts Building, isn't that true? A. That is true.

Q. You were among those pickets? A. Yes.

Q. On the way to this demonstration some member of ACTION told you that he was planning to chain the front door of the Roberts Building, isn't that true? A. Yes.

Q. When he told you that you were on the way to the demonstration, true? A. Yes. Something like that, yes.

Q. Mr. Green, you didn't instruct him not to do that, did you? A. No.

Q. In your capacity as head of the picket line and chairman of ACTION at the time you learned that somebody in ACTION was planning to put a chain on the door of the Roberts Building you didn't tell him, don't do that as a member of ACTION, did you? A. That's right.

Q. Subsequently someone did chain the front door of the Roberts Building while McDonnell employees were inside, isn't that true? [130] A. That is right.

Q. And you approved of chaining the door, didn't you? A. I approved of——

Q. The question is just whether you approved of chaining the door. You approved of that action, did you not? A. Yes.

Mr. Foote: No further questions.

Mr. Gilden: Your Honor, I would like to reserve my redirect questioning of Mr. Green. I have a witness from Washington, D. C., who has a flight at 6:30 this afternoon. I have talked to Mr. Foote about it and he has no objection if the Court has no objection.

The Court: Very well.

Mr. Gilden: Step down.

(Witness temporarily excused.)

PETER C. ROBERTSON

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Gilden

Q. Will you please state your name? A. Peter C. Robertson.

Q. What is your home address? [131] A. 4715 Little Falls Road, Arlington, Virginia is my present address.

Q. What is your business or occupation? A. I am employed by the Federal Government.

Q. In what capacity? A. I am Director of State and Community Affairs for the Equal Employment Opportunity Commission.

Q. How long have you been so engaged in this type of work? A. In the particular job or the type of work?

Q. I am sorry, for this particular job. A. I worked with the Equal Employment Opportunity Commission for just short of three years. I was originally employed by them as Director of Program Planning and Review, and for the last two years I have been Director of State and Community Affairs.

Q. Prior to the time that you entered into this job, did you have any capacity with the Missouri Commission on Human Rights in Missouri? A. Yes. I was Executive Director of that Commission for just short of four years.

Q. Commencing when and ending when? A. Commencing in late April of 1963 and ending when I went on leave of absence in February of 1967.

Q. When you went on leave of absence did you go into the [132] Federal Equal Employment Opportunity Commission? A. Yes, I was.

Q. And you have been with them ever since, is that correct? A. Yes, sir.

Q. While you were with the Missouri Commission on Human Rights you were the Executive Director of said Commission? A. Yes.

Q. Appointed by the Government of the State of Missouri? A. Hired by the Commission which was in turn appointed by the Governor.

Q. The Governor appointed a Commissioner and the Commission in turn hired you, is that correct? A. Yes.

Q. Are you a graduate of any law school? A. I am a graduate of Yale Law School.

Q. When did you graduate? A. 1960.

Q. Are you a member of any bars of this country? A. I am a member of the Bar of the State of Missouri and the District of Columbia.

Q. Have you also worked for a Congressman subsequent to your employment, rather subsequent to your getting your law degree? [133] A. Yes. My first permanent employment was administrative assistant to a United States Congressman.

Q. Which Congressman was that? A. Henry Royce of Wisconsin.

Q. I see. Then you entered into your duties with the Missouri Commission on Human Rights after you left the Congressman's services? A. Yes.

Q. While you were so engaged with the Missouri Commission on Human Rights, did you have a complaint of Percy Green against McDonnell-Douglas as a matter of investigation? A. Yes, I did.

Q. Do you know when you first undertook the investigation of a complaint of Percy Green against McDonnell-Douglas Corporation? A. Late August and/or early September of 1964.

Q. Had you received any complaint from Mr. Green personally about discrimination at McDonnell-Douglas? A. He filed a written complaint with our Commission.

Q. Is that the authority under which you undertook your investigation? A. Yes, it was.

Q. In the course of your investigation did you have the opportunity to interview certain witnesses or people about this [134] alleged discrimination? A. I did.

Q. What witnesses or people did you interview? A. I interviewed Mr. Green, the charging party, first which is standard operating procedure. I then interviewed representatives of the respondent company.

Q. Which representatives did you interview of McDonnell Corporation? A. I interviewed Mr. Krone, Mr. Windsor, very briefly Mr. Sant, who was their attorney; talked also with Ed Sinecki, Dave Birge, Mr. Godefroid, and a gentleman by the name of Moehlenkamp.

Q. Was Percy Green the first person that you talked to in the course of this investigation? A. Yes, he was.

Q. Do you know when you undertook this investigation? A. It was, again, in late August or in September of 1964.

Q. Did you subsequent to your interview with Mr. Green, have the opportunity of interviewing Mr. Krone? A. I did.

Q. In your conversation with Mr. Krone did you receive certain data from McDonnell-Douglas Corporation? A. Yes. It is standard operating procedure to attempt to obtain documentary evidence and records that will deal with [135] issues in the case.

Q. Have you turned over to me the documentary evidence that was supplied to you as Executive Director of the Missouri Commission on Human Rights? A. I have.

Mr. Gilden: Will you mark this Plaintiff's Exhibit 33?

(Thereupon, the book above referred to was marked by the reporter for identification as Plaintiff's Exhibit 33.)

Mr. Foote: May I approach the bench?

The Court: Yes.

(Thereupon, there was a conference at the bench off the record.

Thereafter, the trial on the issues was resumed on the record.)

Q. (By Mr. Gilden) Mr. Robertson, what you have supplied to me has been marked as Plaintiff's Exhibit 33. I will hand it to you at this time. I will ask you some questions about what the contents are. First, I will ask you something about Mr. Krone. Do you know what office he occupied with McDonnell-Douglas Corporation? A. I do not recall his precise title, he was director of personnel or in charge of the personnel office.

[136] Q. Now, your appointment with Mr. Krone, how did that come about? A. After I interviewed the charging party I called the personnel office at McDonnell-Douglas, then McDonnell Aircraft, and asked for an interview with the appropriate person to discuss this matter that we had under investigation. I was referred to Mr. Krone and subsequently interviewed him.

Q. While you interviewed Mr. Krone was any other personnel person present at McDonnell-Douglas Corporation? A. I talked to him on several occasions. Sometimes it was alone, sometimes Mr. Windsor was present, and then on occasion when I interviewed other employees of the corporation either Mr. Krone or Mr. Windsor were present in the room.

Q. Do you know how long this investigation took while you were down at McDonnell Corporation? A. I was there for the better part of two days initially, and I think I

came back for part of a third day. In any case it stretched over one whole week.

Q. All right. While you were—Strike that. Did Mr. Krone have his offices at the McDonnell Corporation? A. His office?

Q. His office? A. Yes.

Q. And you visited him at his office at McDonnell [137] Corporation? A. Yes.

Q. You testified at times Mr. Windsor was present and at times he would leave, is that correct? A. That is correct.

Q. While you were present with Mr. Krone you asked him for certain information to be supplied to the Commission? A. That is correct.

Q. Will you look in that exhibit that has been marked Plaintiff's Exhibit 33 for identification and identify for the Court the documents that were supplied to you by Mr. Krone that belong to McDonnell Corporation? A. Yes. I have tabbed the documents in this notebook for easy reference. Items 1 through 4 did not come from Mr. Krone. Items 5 through 31, with the exception of Item 23, came from that meeting with Mr. Krone.

Q. All right. A. Items 32 through the end did not come from him.

Q. That would be 5 through—What was that last number that came from Mr. Krone? A. 5 through 31 with the exception of 23.

Q. I see. With the exclusion of 23. Can we designate then as an exhibit that this is Plaintiff's Exhibit 33, with subparagraphs 5 through 31, with the exclusion of 23, for the [138] purpose of identification?

Is that all right, Mr. Foote?

Mr. Foote: It is all right with me. Can I take a look at the exhibit?

Mr. Gilden: Certainly.

Mr. Foote: 23 was excluded?

The Witness: Is that the yellow piece of paper?

Mr. Foote: Yes.

The Witness: Yes.

Mr. Foote: Thank you.

Q. (By Mr. Gilden) Mr. Robertson, in your discussions with Mr. Krone, did you discuss the question of Mr. Green's layoff with him in August 1964? A. I did.

Q. Did Mr. Krone tell you how the layoff came about? A. Yes. He indicated that in the middle of July, approximately July 15th, there had been an indication that the work on the Gemini was being phased out and this would result in a reduced need for manpower in E.E.D. of approximately one hundred seven people, and that a process was then set in motion which ultimately led to the layoff in question.

Q. What was the process that was carried out that finally made the determination of the layoff of Percy Green and other individuals? [139] A. During the latter part of July there was an over-all appraisal of the work situation.

Mr. Foote: Excuse me, sir. Is this still what Mr. Krone said?

A. Yes. I am reiterating what Mr. Krone explained of the procedure, that during the latter part of July they made a determination of the total quantity of work that would be discontinued and the manpower need in question; so that by early August they had a specific estimate that they could then give to each department. They gave a general estimate of numbers to Mr. Godefroid and Mr. Sinecki concerning the department in which Mr. Green worked. Subsequently Mr. Godefroid and Mr. Sinecki

ranked the individuals in those departments and came up with a specific list of those.

Q. (By Mr. Gilden) Is there a document in that exhibit that reflects the people that were going to be laid off and a document that was then referred to and has been referred to as a totem pole? A. Yes, there is.

Q. Is it tabbed, Mr. Robertson? A. It is one of the documents, tab 17.

Q. Tab 17? A. Yes, sir.

Q. Will you turn to that page, Mr. Robertson? That is the [140] totem pole? A. Yes.

Q. Is that the document that Mr. Krone was talking about which reflects people that were going to be laid off by decision of Mr. Godefroid and Mr. Sinecki? A. Yes. He identified it as such. And I subsequently showed it to Mr. Sinecki and he identified it as such.

Q. Did Mr. Krone tell you the basis upon which this totem pole was set up or the criteria? A. He indicated it was the custom at McDonnell Aircraft from time to time for supervisory employees to rank those under their supervision in the general order of their competence and that this was a document similar to those documents which they refer to as a totem pole.

Q. Now is that broken up into lab technicians A and lab technicians B? A. Yes. It has each of the various categories.

Mr. Foote: Excuse me, I think the document speaks for itself, Your Honor, unless this is what Mr. Krone told this witness.

Mr. Gilden: Well, all right I will offer into evidence, Your Honor, all of—I will offer into evidence that which has been identified by Mr. Robertson of Exhibit 33, from parts 5 through 31, inclusive, with the exclusion of 23.

[141] The Court: Any objection?

Mr. Foote: No objection, Your Honor.

The Court: They may be received.

Q. (By Mr. Gilden) Now, Mr. Robertson, turn to tab 17 which is known as the totem pole. Did you discuss that patricular document with Mr. Krone? A. I did.

Q. Did you refer to the totem pole in your conversation and did he refer to it in your conversation you had with him? A. He did and I did.

Q. Were markings placed upon that document at the time you were in his office? A. When I first received the document there were lines drawn across the page between certain names, with abbreviated notations next to the lines, and it was explained to me by Mr. Krone that the basic division of the list was first into job categories, so that there is a list of the development technicians followed by a list of technician A, followed by a list of technician B and so on. The second division within each job group was the totem pole division, that is the over-all ranking of the individuals as made by Mr. Sinecki and Mr. Godefroid in terms of their over-all ability.

Q. Is Mr. Green's name listed on the totem pole? A. He is.

[142] Q. Is there a line above Mr. Green's name? A. There is.

Q. Who placed the line there? A. Mr. Krone placed that line there on the 17th of August, and I noted that fact by having Mr. Krone enter on the document the notation 17 August Krone, because when I examined the original of this document that line appeared to have been made at a different time than the original document. I asked him if it was made at a different time. He confirmed that it was and indicated that he had made that line.

Q. Did you make an investigation of the names on the totem pole of which parties were in fact laid off? A. I did. I based that investigation upon a number of the other documents supplied to me by Mr. Krone and included in this collection.

Q. How many people were actually in fact laid off?

Mr. Foote: I'm not sure that a foundation has been laid for that. This witness was not an employee of McDonnell. I still think the document speaks for itself. I object to the question on that ground.

Mr. Gilden: I asked him whether he had made an investigation as to the parties that had been laid off and he said he had.

The Court: Are you talking about the totem pole?

[143] The Witness: My testimony as to that question would be based upon what Mr. Krone told me.

Mr. Gilden: All right.

The Witness: He indicated there were sixteen people originally scheduled for layoff, of whom two resigned, six were transferred, and eight were ultimately laid off.

Q. (By Mr. Gilden) Were you also told by Mr. Krone that a test had been offered Mr. Green and he had refused to take the test? A. I was told that.

Q. Were you offered documentation by McDonnell-Douglas Corporation of Mr. Green's work record as well as the work record of other employees who were also in that department and whose names were also listed on the totem pole? A. I was.

Q. Do you have the documentations as to certain other individuals who were on the totem pole who had taken the test or of other parties who had not taken the test and were retained by the McDonnell-Douglas Corporation? A. Yes. At tab 20 there are several documents. There is

first a memo dated 26 August 1964 from Mr. W. J. Garland to Mr. C. L. Windsor. Subject, qualifications appraisal of laboratory technicians B affected by E.E.D. reorganization. Then there is a handwritten notation on that which was there at the time [144] I received it, "5 technicians B who were surplused and who were able to be relocated."

Q. Did you note whether any of these people that were actually relocated were actually below Mr. Green's name on the totem pole? A. Yes. Of the people who were relocated I think three were below Mr. Green on the totem pole.

Q. Would your records reflect whether they took the test and passed the test prior to their relocation? A. There are several documents here at tab 20 which are entitled "Biographical Summary". They each appear to have been prepared on 8-14-64, which was the date that Mr. Krone indicated the original layoffs were announced to Department 958.

Q. Can you give me the names of the employees for whom you have biographical summaries? A. Yes. Percy Green, Mr. Gaffney, G-a-f-f-n-e-y.

Q. Let's take Mr. Gaffney. Is there any notation on his biographical summary as to whether he took the examination? A. A notation appears at the top of the second page "Not given test for I-n-s-p.". Then the following notation, "R E E at Cape Kennedy."

Q. Does that indicate that he was probably at Cape Kennedy at the time? A. I interpreted it in that fashion. It was so explained [145] to me, and other in-house memos reflected this was one of the reasons he was not laid off.

Q. Can you tell us whether Mr. Gaffney's name was below Mr. Green or above Mr. Green's name on the totem pole? A. Mr. Gaffney's name is above Mr. Green's on the totem pole.

Q. Is there any other biographical summary that you have of employees whose names are also reflected on the totem pole? A. Mr. Mitchell.

Q. Anyone else? A. Mr. Graville, G-r-a-v-i-l-l-e, first name Daniel L.

Q. Is there a notation as to whether Mr. Graville took the examination? A. There is a notation "Failed test for I-n-s-p period Capital B capital E capital E."

Q. That is the same examination that was on Mr. Green's biographical sketch which reflects he did not take the examination, is that correct? A. It appears to be the same test.

Q. Do your records show whether Mr. Graville's name is below or above Mr. Green's name on the totem pole? A. He is substantially below Mr. Green.

Q. How many names below Mr. Green's name did Mr. Graville's name appear? [146] A. Twenty.

Q. Based upon your study and from what Mr. Krone told you, Mr. Graville was relocated within the McDonnell Corporation, is that correct? A. Yes.

Q. And he had failed the examination? A. Yes.

Q. Now just so we are clear about the totem pole, it was graded, developed and graded by Mr. Sinecki and Mr. Godefroid, is that correct, based upon their determination as to the relative strengths of the people in that department, is that correct? A. That is correct.

Q. When I say strengths, the rating of their ability and the kind of work they performed? A. That is correct. An over-all ability rating was the type of language they used in describing it.

Q. Did Mr. Krone ever tell you about how he gauged people for employment at McDonnell Corporation? A. Do you mean in terms of consideration for this specific layoff or in general? A. In general.

Mr. Foote: I fail to see the relevancy of that question. [147] Mr. Gilden: I will confine it then to the layoff.

Mr. Foote: I fail to see the relevancy of that, that general a question.

Mr. Gilden: I am relating it to the layoff of Mr. Green and the basis upon which determinations were made for layoff.

Mr. Foote: If your question is whether Mr. Krone told Mr. Robertson why Mr. Green was laid off or the rationale for it, then I withdraw my objection. Is that your question?

Mr. Gilden: That isn't my question. I am asking whether a general comment was made by Mr. Krone to you about that, determinations that are made for people being employed by McDonnell-Douglas and the reasons for which they are laid off.

Mr. Foote: I withdraw the objection.

A. We had a discussion in which he outlined three criteria that had been taken into consideration in deciding the individuals ultimately to be placed on layoff.

Q. (By Mr. Gilden) What was this criteria? A. The three criteria were first, a mixture of experience and length of service; secondly, an appraisal of their ability; and third, an examination of the specific projects or work in which they were currently engaged, so that between two people of equal ability one who was working on a continuing ongoing project might be retained while one working on a project about to be [148] discontinued would have been placed on the layoff list.

Q. Did you have any trouble with Mr. Krone in obtaining the documentation that you have testified from? A. I did.

Mr. Foote: I will object to the question. I don't understand what the word trouble means. The witness has testified these documents were given to him by Mr. Krone.

Q. (By Mr. Gilden) I will eliminate the word "trouble" and say did you have any difficulty obtaining documentation?

Mr. Foote: I will object again on the basis that is asking for this witness's opinion of what is difficult and what is not.

The Court: Did you get the documents from him?

The Witness: I did, but I had to ask several times and he was quite hesitant and made it difficult and on some occasions did not in fact give me documents that I requested.

Mr. Foote: I object to the answer as not being responsive and move it be stricken on the basis it is this witness's opinion of another man's state of mind.

Mr. Gilden: It is not a state of mind, it is something that actually happened. This witness was actually confronted with it.

The Court: Overruled. Proceed.

Q. (By Mr. Gilden) Now, Mr. Robertson, did you in the [149] course of your discussions with Mr. Krone discuss with him the question of Percy Green being transferred into Department 958? A. I did.

Q. Did he also supply any documentation to you about any other individuals that were transferred from Department 966 to 958 after Mr. Green had requested transfer? A. Upon my request he supplied some documents relating to an individual by the name of Lowe.

Q. Is that document in that exhibit that you have already testified to? A. Yes, it is.

Q. Does it bear documentation of a person by the name of Lowe who was considered for transfer to Department 958? A. There is a document at tab 13 entitled "Request for Transfer" in which a David L. Lowe clock No. 17429 in Department 966, applies for a transfer.

Q. Do you know the date of that transfer or request for transfer? A. Yes. It is dated May 27th, 1963.

Q. Does it show what Mr. Lowe's first name is? A. David L. Lowe.

Q. Is there any color associated with the application for transfer? A. His race?

[150] Q. Yes. A. Not indicated on the document.

Q. All right. Based on your conversations with Mr. Green and also with Mr. Krone, did you find out when Mr. Green first requested transfer to Department 958? A. First requested transfer?

Q. Yes. A. Sometime in 1962.

Q. All right. Based upon the information received, did Mr. Green actually transfer to Department 958 at that time? A. He did not.

Q. Did you, in the course of your investigation, also talk to Mr. Sinecki? A. I did.

Q. Did you, in your discussions with Mr. Sinecki, go over the discussions between Mr. Sinecki and Mr. Green at the time that the first request was made in February 1962? A. I did.

Q. Did Mr. Sinecki at that time tell you what he told Mr. Green? A. He did.

Q. What did he say? A. He indicated he had discussed with him the fact that Department 958 was a non-union department; and that he had [151] warned Mr. Green that there was a considerably higher risk of unprotected lay-off by serving in that department.

Q. Now how long did you spend—I think you have already testified at least two days with Mr. Krone and Mr. Windsor or thereabouts, is that correct? A. I was at McDonnell Aircraft for the full part of two business days and a short additional time on a third day.

Q. Did you have any other discussions with Mr. Krone with respect to the charges by Percy Green and the reasons given by McDonnell-Douglas for the particular layoff in August 1964? A. I am not sure to what you are referring. He indicated he had done an extensive in-house investigation of his own on this matter which was the reason that he had these documents assembled at the time I interviewed him.

Q. The documentation that you have there in the exhibit that has been given to you, do you know that there are a number of letters of various people who wrote letters about their relationship with Percy Green at McDonnell-Douglas Corporation? A. Yes. There are a number of in-house memos.

Q. Do you know the dates of those letters by looking at these exhibits? A. Do you want me to go through all of them?

Q. Just give me the people and the dates that they were, [152] that these letters were drafted or the memoranda were drafted. A. At tab 20 there is a memo dated 26 August 1964 from Garland to Windsor which I have already mentioned. At tab 17, behind the totem pole, there is a memo dated 9 September 1964, from Mr. Sinecki to Mr. Windsor. At tab 24 there is a memo dated 15 August 1964, from Sinecki to Windsor, and a memo dated 27 August '64 from Sinecki to Windsor.

Q. Now, Mr.—— A. There are more.

Q. All right, go ahead, I am sorry. A. At tab 25 there are a number of short one-page memos, 2 September '64, To Whom It May Concern memo from Gil Gherdini,

G-h-e-r-d-i-n-i; 31 August '64, a To Whom It May Concern memo from John W. Hammond, H-a-m-m-o-n-d; a 9 September '64 memo from George Brenner, B-r-en-n-e-r. There are additional ones. Do you want the whole list?

Q. The exhibit will reflect all these letters and memos that were supplied in-company, is that correct, that Mr. Krone supplied you? A. That is correct. He had an extensive file. These were the only items he was willing to give me. There were other items that he would not give me.

Q. All right. Now, Mr. Robertson, while you were employed by the Missouri Commission on Human Rights, did you [153] have the opportunity to investigate complaints based upon discrimination in employment? A. I investigated a number of complaints alleging discrimination.

Q. Prior to the time that you undertook this investigation—Let me strike that. During the time that you were employed by the Commission, how many matters would you say you investigated in the course of your employment? A. Approximately a hundred.

Q. By reason of your position as Executive Director of the Missouri Commission on Human Rights, were you placed in a position by law to make certain findings for the Commission itself? A. Certain recommendations.

Q. Certain recommendations? A. Yes, sir.

Q. Did you do so in the course of your employment by the Missouri Commission on Human Rights?

Mr. Foote: I object to that question as being irrelevant. Whatever this man concluded or reported, I believe, is not relevant to the testimony in these matters.

Mr. Gilden: I am just laying a foundation for some other testimony. It has nothing to do with this particular matter at this point.

[154] Mr. Foote: That is my objection.

Mr. Gilden: I will tie it in later, Your Honor.

The Court: All right.

Mr. Foote: There are a number of——

The Court: The internal work of the Commission, what does that have to do with this lawsuit? The Commission made a finding, didn't it, in this case?

Mr. Gilden: Not the Missouri Commission, no, they did not make a finding. Your Honor, what I am doing here, so that Your Honor understands, I think Mr. Robertson has expertise in this particular area in the nature of investigation and findings, and I will tie in what I am doing right now with something later on that will be developed. I just want to get it in at this point. It is irrelevant at this particular time but it will be tied in. I am qualifying him as an expert in this particular area, on questions of determination of discrimination.

The Court: What is it you are wanting him to testify to?

Mr. Gilden: Hopefully he would testify as to certain findings of discrimination that he made here and that he was qualified to make these findings.

The Court: Then what did the Commission do?

Mr. Gilden: The Commission never made any judgments [155] in this matter at all.

The Court: So they didn't agree with him, is that right?

Mr. Gilden: I don't say they disagreed, I say there were never any findings made by the Missouri Commission on Human Rights to my knowledge, which means they neither rejected nor accepted at this point.

Mr. Foote: Your Honor, I renew the objection as to the relevance, this man whether he has made a number of investigations or not, is certainly not qualified as an expert

to determine the ultimate issue of this lawsuit. That is what the trier of facts is here for.

Mr. Gilden: Let me continue. All right, you have your objection in, let the Court rule on it.

Mr. Foote: Mr. Gilden has stated himself that the questions at this stage are not relevant. I fail myself to be convinced that they are going to be relevant so I make the objection to the question.

Mr. Gilden: I am going to tie it in with his expertise which will lay the foundation for certain findings and judgments that he will testify to, or, hopefully testify to with respect to the area of discrimination in this case. Now what I am laying here is a foundation for his expertise with the Missouri Commission on Human Rights as well as his expertise [156] with the Equal Employment Opportunity Commission of the United States, which lays the foundation with all of these jobs that he has performed and all of these investigations, all the things he has done.

The Court: Are you asking him to testify in effect that there was probable cause to believe that McDonnell discriminated against him because of his expertise, is what you are asking?

Mr. Gilden: Your Honor, it is no more than a doctor coming in and saying——

The Court: Isn't that what you are asking him to testify?

Mr. Gilden: Not probable cause, based upon his expertise as to whether there was discrimination in this area.

The Court: If he has an opinion that there was discrimination?

Mr. Gilden: That is correct.

Mr. Foote: I will renew the objection.

The Court: I will sustain the objection.

Mr. Gilden: Then I will make an offer of proof here.

The Court: Proceed.

Mr. Gilden: Let me go on. I will make the offer of proof later.

Q. (By Mr. Gilden) Mr. Robertson, in the course of your [157] conversations with Mr. Krone did he show any disturbance with the questions that were being asked?

Mr. Foote: I will object to that, Your Honor. I don't believe——

The Court: I will sustain the objection.

Q. (By Mr. Gilden) Mr. Robertson, at any point did he raise his voice at you in the course of your discussions with him? A. He did.

Q. When did this occur? A. Toward the end of the last of several interviews that we had had.

Q. And—— A. (Continuing) He objected to the length of time we had spent on the investigation, the number of questions I was asking, and the number of people we were trying to interview, the number of documents we wanted to examine.

Q. Did he say anything to you as he raised his voice? A. Yes. He had already reported to me on the extensive in-house investigation that he had done of the allegations of Mr. Green. And when I indicated that I could not accept his investigation but had to do one of my own, he stood up from his desk, he raised his voice, and he asked me who was I going to believe, him, the white employment manager, or some unemployed [158] black.

Mr. Foote: I object to that answer. Is it your testimony that that is what Mr. Krone said or is that your characterization?

The Witness: Would you like me to put it in quotations?

Mr. Foote: I don't understand the testimony. Are you saying that is what Mr. Krone said?

The Witness: Yes, I am.

Q. (By Mr. Gilden) Now in the course of your investigation of this matter, did you ever have any interviews with any people who knew anything about this Cape Kennedy matter that was referred to in testimony earlier? A. Well, I interviewed a gentleman by the name of Moehlenkamp, who discussed it, and I examined a memo on the matter by a man by the name of Hammond, which was made available to me by Mr. Krone.

Q. Who is Mr. Moehlenkamp? A. Moehlenkamp was a, I cannot recall his exact title, but he was a supervisory level, low level supervisory employee of McDonnell's, who had previously had an opportunity to supervise and inspect work of Mr. Green in either 1961 or '62.

Q. Did Mr. Moehlenkamp comment to you about the Cape Kennedy situation with respect to Mr. Green? [159] A. He did.

Q. What did he say about that? A. He indicated that when Mr. Green had the opportunity to go to Cape Kennedy he had discussed with Mr. Green the racial situation that might exist in Florida and the difficulties Mr. Green might experience in working and living there.

Q. Did he say that he recommended that Mr. Green not go to Cape Kennedy because of the racial situation in the South? A. He indicated he had not made a very firm recommendation but he had encouraged Mr. Green to think about it very seriously before making a decision. And he indicated several times that the main reason he had had this discussion was that when Mr. Green brought the matter up to him he wanted Mr. Green to consider

very carefully the racial implications of working and living in Florida.

Q. Did you in the course of your investigation also have the opportunity to witness the picketing of Mr. McDonnell's home? A. I did.

Q. Was this going on while your investigation was taking place at McDonnell-Douglas Corporation? A. It was either during the week of my series of interviews or at the end of that week while I was still in St. Louis and before I returned to Jefferson City.

[160] Q. You decided to go out and witness the picketing? A. I felt it was appropriate to.

Q. Did you go out there in fact? A. I did.

Q. Do you know where the picketing took place that you observed? A. The picketing that I witnessed was on Warson Road.

Q. Did you notice anybody on Mr. McDonnell's property, to your knowledge? A. My understanding of where Mr. McDonnell's property is located is that it was some distance down the lane which comes into Warson at that point, and they were even out of sight of his property on the day I witnessed it.

Q. I see. Did you see any violence on the occasion that you witnessed? A. I saw nothing but——

Q. Did you see any destruction of property or injury to any persons or destruction of any property? A. I did not.

Q. All right. You have already testified that you talked to Mr. Sinecki. Did you go into, with Mr. Sinecki, the question of Mr. Green's move into the Department 958? A. I did.

Q. Did you discuss with Mr. Sinecki the question of the [161] tour that is usually afforded to people when they enter a new department? A. I did.

Q. Did Mr. Sinecki tell you whether or not Mr. Green received a tour? A. In response to a direct question he was unable to assert specifically that a tour was given him and answered only that it was standard practice to give one and he was sure Mr. Green had received one.

Q. Do you know whether Mr. Green received a training period at the time he moved into this new department? A. There is a memo in the file and I can cite a tab if you want, indicating, from Mr. Sinecki indicating that there may not have been an extensive training or orientation period because Mr. Green had already had five years of experience.

Q. Mr. Sinecki stated he didn't need a training period because he had the five years' experience in a job similar to that which he was going to undertake in Department 958? A. Correct. At tab 24 a memo dated 15 August 1964 from Mr. Sinecki to Mr. Windsor, in paragraph 2.3, Mr. Sinecki says, "Mr. Green mentioned that he did not get the same training as other new technicians in the department in which their first three to five days are spent being taught soldering and assembly techniques and familiarization with various MAC process specifi- [162] cations. This is true, but considering the fact that he already had spent five years at MAC doing exactly this type of work, it was highly unlikely that any training would be required." He confirmed that memo in my discussion with him.

Q. Getting back to Mr. Krone, did he indicate whether or not they were going to try to find a job for Mr. Green after the layoff? A. His position on each occasion during that initial investigation when I talked with him was that the matter was not closed and that he was actively seeking positions within the company to which Mr. Green could be transferred.

Q. Did you actually receive some documentation from various departments based upon in-house communications

from Mr. Krone to certain departments, or from some other advisory personnel to certain departments as to whether jobs were open for Mr. Green or other people? A. Yes. There is an in-house document here, I don't think I can put my hand right on it. Yes, here it is, at tab 29, a document entitled "Informal Memo 3 September 1964 from W. J. Garland to D. F. Waters," it lists nine typed items and two handwritten items under the following opening sentence, "The following areas and supervisors were contacted to date relative to manpower requirements in the laboratory technician-electronics type assignments:" That was offered to me as [163] evidence that Mr. Krone and others were making a vigorous attempt to place not just Mr. Green but all of the individuals who had been surplused at that time.

Q. All right. Now getting back—and I keep bouncing back and forth here—to the totem pole again, can you tell me based upon looking at that totem pole who is the highest ranked person on that totem pole who was laid off? A. Yes, I can.

Q. Who was that? A. Mr. Green.

Q. Do you know whether there are any other blacks in this particular department, based upon your investigation? A. Mr. Krone indicated that there were not.

Q. Mr. Green would be the only black in the department, is that correct? A. That is correct.

Q. Did you also talk to Mr. David Birge? A. I did.

Q. What was the nature of the conversation that you had with him? A. It dealt primarily with——

Mr. Foote: Would you identify Mr. Birge?

Mr. Gilden: Yes.

Q. (By Mr. Gilden) Would you tell us who Mr. Birge was? [164] A. I cannot give you his exact title, but he was in charge of personnel for E.E.D., if I recall cor-

rectly. His was a personnel function rather than an operating function. He had had a discussion with Mr. Green on one of the occasions when Mr. Green had sought to transfer into Department 958, the non-union job.

Q. Did he, did Mr. Birge tell you about this particular transfer? A. He did. He indicated he had attempted to discourage Mr. Green.

Q. Did he say why he had attempted to discourage Mr. Green from transferring? A. He spoke of the problems of transferring into a non-union shop where there is no protection from layoffs. He indicated he had told Mr. Green he was walking into a lion's den. I wouldn't do it if I were you.

Q. Did you discuss with Mr. Birge as to whether or not a tour of duty had been given Mr. Percy Green when he moved into Department 958? A. I did.

Q. Not a tour of duty but a tour of the department? A. The tour of duty issue, if I can make one sentence of my answer, it was standard McDonnell practice, as explained to me by several of the representatives I interviewed, to give a [165] potential transferee a tour before he was accepted for transfer, so he could be fully aware of the type of work he was transferring into. I discussed with both Mr. Sinecki and Mr. Birge and Mr. Godefroid whether a tour had been given. They all felt one had been given but none of them would answer yes to a direct question, "Did you give or do you know of first-hand knowledge that a tour was given?"

Q. Did you also talk to Mr. Bob Godefroid? A. I did.

Q. What was his title at that particular time? A. Again I cannot give you the exact title, but he was in an operating capacity above Mr. Sinecki in the operating end of E.E.D.

Q. What was the nature of the discussions you had with Mr. Godefroid? A. Again it related to the discussions he had had with Mr. Green concerning the potential transfer, and it also related to the work that he and Mr. Sinecki had done in preparing the list of individuals to be laid off.

Q. He was one of the people, was he not, with Mr. Sinecki who made up the totem pole, is that correct? A. They were the two people who made the totem pole, yes, sir.

Q. All right. Did you discuss with Mr. Sinecki Mr. Green's appearance? [166] A. I did.

Q. Can you tell us what happened or what Mr. Sinecki said about Mr. Green's appearance while he worked in the various departments? A. He admitted that he had talked to Mr. Green about Mr. Green's dress, his beard and his dark glasses. He indicated two reasons that he had discussed, his first reason related to the dark glasses. He specifically indicated he was concerned whether the dark glasses would hamper Mr. Green's ability to identify color-coded components. He also indicated that as to the dress he was concerned whether Mr. Green would fit into the department.

Q. Did Mr. Sinecki tell you how he rated Mr. Green's work in Department 958? A. Yes, it was either average or above average.

Q. All right. Did you discuss with Mr. Sinecki as to how the totem pole was revised? A. I did.

Q. What did he state? A. He indicated that in early August they received notification, I believe from a Mr. Martin, I do not recall his title, that some individuals were to be laid off. Then he sat down with Mr. Godefroid and they came up with the ranking which [167] ultimately became the totem pole. I showed him the document which I had obtained from Mr. Krone, and which we have previ-

ously discussed at tab 17, and he identified that as the totem pole which had been prepared at that time.

Q. In the course of your discussions with any of these individuals, did any of them comment on the climbing of the Arch by Mr. Green? A. I think it was discussed in the conversations with Mr. Krone and Mr. Windsor as indicating that there was an absence of discrimination on the part of McDonnell Aircraft. They alleged that if they had wanted to discriminate they would have taken action against Mr. Green at the time he climbed the Arch, and they had not done so.

Q. Did Mr. Moehlenkamp in his discussions with you rate the quality of Mr. Green's work? A. Yes.

Q. What did he say? A. He rated him above average as compared with other union people. He spoke of him as an individual with high motivation to get ahead and indicated that he was an individual who would not simply sit passively doing his work but actively sought to participate in the solution of difficult problems.

Q. Did he also have the opportunity to look at this totem pole you had been given by Mr. Krone? [168] A. I didn't show him the document, I discussed with him the names of some of the individuals on it.

Q. Did he know Mr. Richardson who was on the totem pole? A. That was the only individual on it that he recognized.

Q. How did he rate Percy Green as against Mr. Richardson? A. He indicated he would have retained Green and released Richardson based upon his supervisory contact with Mr. Green.

Q. Do you know whether Mr. Richardson was retained or declared surplus? A. I believe he was retained.

Q. Can you check your records and let us know? A. Mr. Richardson was retained.

Q. Now who was the last person you questioned at McDonnell Corporation at the time you temporarily suspended your investigation? A. I believe it was Mr. Krone. The normal practice is to have a termination interview before leaving the premises. It would have been with either Mr. Krone or Mr. Windsor. However I had so many conversations during that week that the precise order in which they occurred is a little bit blurred.

Q. I believe you have already testified Mr. Krone said the matter was still open, they were still looking for a job for Mr. Green, is that correct? [169] A. That is correct. That was the position they took when I terminated the investigation at that time, that they were still actively seeking a relocation for him.

Q. To your knowledge were you ever informed that a job had been obtained for Mr. Green? A. No, I was not.

Q. All right. Did you have occasion thereafter to conduct another investigation with respect to the complaints of Percy Green and the McDonnell-Douglas Corporation or were they a continuing investigation? A. There was no additional investigation on the complaint we have just discussed. In 1965 we received a new complaint. We received actually two documents. Mr. Green filed a document constituting a formal complaint with the Missouri Commission on Human Rights. In the intervening time the Federal Civil Rights Act had been enacted and he filed a complaint with the Equal Opportunity Commission in Washington which was referred to us, which had two bases for jurisdiction. The complaint alleged that he had applied for rehiring and been refused rehiring on discriminatory basis.

Q. Now when did you next go out to McDonnell-Douglas Corporation? A. I did not conduct the investigatory stage of that. My next trip to McDonnell-Douglas was after the investigation of [170] that complaint.

Q. Who handled the investigation of that particular complaint? A. A field investigator by the name of Jim Connell.

Q. He was operating under your control? A. He was. I received a telephone call from Mr. Morley who was assigned to the President's Committee on Equal Employment Opportunity, which subsequently became the office of Federal Contract Compliance. He worked for the Navy Department which actually did the investigation. He called to indicate that Mr. Green——

Mr. Foote: I object to this as hearsay, Your Honor.

Q. (By Mr. Gilden) Anyway, Mr. Connell was working for you in this regard? A. I assigned Mr. Connell to conduct an interview with McDonnell-Douglas on this particular matter.

Q. Is that interview in this particular exhibit? A. The report which he submitted to me after his interview on December 2nd, 1965, is included in this volume as tab 36.

Mr. Gilden: Do you want to see that, Mr. Foote?

Mr. Foote: Yes.

Q. (By Mr. Gilden) Mr. Robertson, you have testified that this was tab No. 36, and this was the report that was sub- [171] mitted to you by Mr. Connell, is that correct? A. Yes.

Q. Now after this report was submitted to you by Mr. Connell, did you have occasion to go out to McDonnell Aircraft Corporation again? A. I did.

Q. What was the occasion for going out there? A. In approximately April of 1966, we were attempting to catch up on the case backlog of the Commission. I had done extensive investigation in this case. I foresaw that it would take a considerable amount of time in writing it up formally. I wanted to see if it would be possible to settle the

case by negotiating the rehiring of Mr. Green, and to that end I wrote the Chairman of the Board of the corporation, Mr. McDonnell, asking for an appointment to discuss the case.

Q. Did you receive a communication from Mr. McDonnell's office? A. I received a communication requesting that I make contact with Mr. Lewis, who was, I believe, President.

Q. That is David Lewis? A. Yes.

Q. Did you in fact then meet with David Lewis? A. I did.

Q. When did this meeting take place? [172] A. April 1966.

Q. Did the meeting take place in his office? A. It did.

Q. Was there a discussion between you and Mr. Lewis? A. There was.

Q. Could you tell us what that discussion was? A. I can. I indicated that we had done an extensive investigation, and that we were in the process of writing it up, and requested that he give serious consideration to the immediate rehiring of Mr. Green.

Q. What did he say to that? A. He indicated that he could not agree to do that.

Q. Did he say anything more, Mr. Robertson? A. Yes, he—I had given as one of the reasons for requesting rehiring the importance of establishing a certain amount of faith in the legal processes as being capable of providing remedies for grievances of minority group individuals and the potential impact upon the black community that the move in rehiring Mr. Green might have. He replied he had a responsibility to consider the impact upon his white employees of the morale problem that would be created by hiring someone who had engaged in the kind of activities Mr. Green had engaged in.

Q. Did he say what these activities were? [173] A. He referred to the stall-in incident and to the picketing of the residence of the Chairman of the Board.

Q. He was concerned about the effect upon the white employees of McDonnell Aircraft Corporation? A. That is correct.

Q. Now, Mr. Robertson, what kind of work do you do at the present time? A. I am Director of State and Community Affairs for the Equal Employment Opportunity Commission. I work on a daily basis with some thirty-nine state level and some one hundred twenty city level Fair Employment Practice agencies.

Q. Do you have occasion to lecture or train people in various states with respect to discrimination in employment? A. I do.

Mr. Foote: Your Honor, I object to that on the basis of relevancy. I renew the same objection as before.

The Court: Sustained.

Mr. Gilden: Well, I will make an offer of proof at this time.

The Court: Proceed.

Mr. Gilden: If Mr. Robertson were given the opportunity to do so, he would testify that he has investigated some one hundred cases in the Missouri area—May I have a voir dire with this witness so that I am not stating something [174] that is not factual, Your Honor?

The Court: He has already stated that.

Mr. Gilden: I would like to know so that it is factual for any appellate court that hears what is the facts, rather than my statement of what the facts are.

The Court: Go ahead.

Q. (By Mr. Gilden) Mr. Robertson, how many complaints have you investigated in the State of Missouri? A. I investigated more than one hundred complaints of employment discrimination.

Q. In the course of your investigation of these matters did you have to make findings of discrimination in employment? A. I made recommendations to my Commission and in every case but one those findings were sustained.

Q. All right. That was over what period of time while you worked for the Commission? A. Three and a half years.

Q. At the present time you state that you have liaison with state and local agencies? A. Yes, sir.

Q. Do you train people to investigate and to become involved in discrimination in employment cases? A. I do. We make financial grants to these agencies and we conduct a training and orientation session to assist them in [175] the wise utilization of the funds we make available.

Q. Do you also then lecture to these people on what to look for in the way of discrimination in employment? A. I do.

Q. How many state agencies have you been involved with? A. In terms of actually conducting training programs of this type I would say between fifty and sixty state and city agencies over a two-year period.

Mr. Gilden: Well, if this witness were given an opportunity to be qualified as an expert, he would testify that based upon his experience, and given all the hypothetical facts that I would like to give to him with respect to the transfer of Percy Green or the attempted transfer of Percy Green into Department 958 and 962, the discouragement from accepting an offer to transfer to Cape Kennedy because of the racial situation in the South, the treatment that he received in Department 958, not being given the same tour that whites received, the training

period that he didn't receive in Department 958, because it was the contention that he already had the experience, that whites would normally receive, and the fact he received no orientation in Department 958, the disparate treatment in being placed on a surplus list on August the 14th, 1964, and the fact that he was not rehired in 1965 because of his race, and the further fact that he had written letters to various agencies to protest [176] conditions of discrimination in employment at McDonnell-Douglas, based upon all of these facts, this witness would have an opinion as to whether or not McDonnell-Douglas was discriminating against Percy Green, the plaintiff in this matter.

The offer of proof would further show that this opinion would be that there was discrimination both on race and color and discrimination because of opposing practices that the Equal Employment Opportunity Law opposes. That would be the offer of proof.

The Court: What was that last?

Mr. Gilden: Race and color as well as discrimination for opposing practices that the Civil Rights Acts of 1964, Title 7, opposes.

Mr. Foote: I renew the objection, Your Honor. I still believe this witness' testimony on that subject is irrelevant, that he is not qualified as an expert on the question which is the ultimate fact in this case and that is for the Court to determine.

The Court: Well, that is his offer of proof.

Proceed.

Did the Missouri Commission make a finding in this case?

The Witness: No. The matter is still pending at this time, Your Honor.

[177] The Court: Is it a matter—Are these documents which you have produced here, are they public documents?

The Witness: These are documents that were supplied to the Missouri Commission in the course of my official duties investigating the case. After consultation with their client chairman I supplied them in response to Mr. Green's subpoena, or Mr. Gilden's subpoena.

Q. (By Mr. Gilden) At any point did Mr. Sinecki or any other people complain that Mr. Green's dress was interfering with his work? A. There was no indication that the dress would interfere with the work.

Q. Mr. Robertson, I don't know whether I—I know I have one employee who failed the test and was retained. Are there any other employees in that exhibit that you have there that were retained although they had failed the test? A. I was able to obtain documents only on a few of the employees who were ranked comparatively with Mr. Green. On the basis of the documents which I obtained, I can only state that there was one individual who ranked lower than Mr. Green, who actually failed the test. There were a number of individuals ranking lower to Mr. Green who were retained and not laid off.

Q. Why were they retained?

[177] Mr. Foote: I will object to that question.

Q. (By Mr. Gilden) If you know.

Mr. Foote: I will still object to the question. This witness can only testify as to what someone told him. He was not an employee of McDonnell.

Mr. Gilden: It Mr. Krone told him or someone else——

Mr. Foote: That is fine if that is the question.

Mr. Gilden: That is the question.

Q. (By Mr. Gilden) Were you told why they were retained, Mr. Robertson? A. As I previously stated, Mr. Krone indicated that in appraising all of these individuals three things had been taken into consideration: First, the

experience that they had at McDonnell Aircraft; secondly, their abilities; and thirdly, the work they were actually doing. And that based upon all three of these factors Mr. Green had been laid off and individuals indicated had been retained.

Q. By looking at the totem pole how many people below Mr. Green's name were retained, based upon what Mr. Krone told you? A. Fourteen.

Q. Fourteen were retained? A. That is correct. Eleven who were never scheduled for layoff and three who were scheduled for layoff but subsequently [179] transferred or placed elsewhere.

Q. In the documentation you would, of course, have Mr. Green's badge number, would you not? A. Yes, I would.

Q. Would that badge number reflect his seniority at McDonnell Aircraft Corporation? A. Yes, his seniority was the highest of that whole group. In other words, he had the lowest badge number.

Q. Mr. Robertson, based upon your experience in the Commission, the Missouri Commission on Human Rights, and your work with the Federal agency, would you say that you are in position to have an opinion as to whether McDonnell-Douglas should have offered a community of life at Cape Kennedy which would be free of discrimination to Mr. Green?

Mr. Foote: I will object to the question, Your Honor, on the ground it is irrelevant.

The Court: Should have offered what?

Mr. Gilden: A community of living for Mr. Green at Cape Kennedy free from discrimination so he could be employed there.

Mr. Foote: As I understand the question your question is whether this witness has an opinion, and his ability to

make an opinion on this subject I think is irrelevant. I think it asks for an opinion.

[180] The Court: I will sustain the objection.

Q. (By Mr. Gilden) Do you have an opinion, Mr. Robertson, as to whether McDonnell-Douglas was, by having a satellite and space program at Cape Kennedy and Cape Canaveral, was required to make a community free from discrimination by reason of color or race?

Mr. Foote: I make the same objection, Your Honor.

The Court: Sustained.

Q. (By Mr. Gilden) During your discussions with Mr. Krone, did he give you the employment figures of blacks and whites at McDonnell-Douglas Corporation? A. He supplied me with a number of documents containing work force breakdown by race.

Q. For what years, Mr. Robertson? A. At tab 30 there is a document marked total non-white employment which he supplied me that breaks down the employment by a number of categories for the years 1943 through 1964. The footnote indicates that the figures refer to the week nearest the 15th of December of each year, with the exception of 1964, when it is a September figure.

Q. Are they broken down by years? A. Yes, they are. The lines across the page are by years, 1943 through '64. Would you want me to read the seven column headings?

[181] Mr. Foote: Your Honor, I believe the document speaks for itself, it is in evidence. I do not see the relevance of these figures in this case which concerns one man at one time and one application for employment. The document is in evidence and I think it speaks for itself.

The Court: Gentlemen, it is 5:00 o'clock. How much longer are you going to have with this witness?

Mr. Gilden: I won't be too much longer, I may have a few more questions and that is it. I think I can finish my direct.

Mr. Foote: Your Honor, I just don't know until we finish. I don't think it will be too long but it may be, depending on what else happens.

The Witness: If it please the Court, it is extremely inconvenient for me to remain another day, if it is possible, consistent with your schedule, to complete this afternoon.

The Court: Let's make it brief.

Mr. Gilden: That is the end of my direct examination.

The Court: Cross-examine.

Cross-Examination, by Mr. Foote

Q. Mr. Robertson, you have testified here about what you were told concerning the totem pole and its use during the [182] layoff period. Were you told also by any of these representatives of the company that you have described that the totem pole was used as a guide in this determination? In other words, that it was not an iron-clad rule, but it was used as a guide among other considerations? A. It was a ranking by general over-all ability, but in terms of the layoff they indicated that ability was just one of three things that had been taken into consideration.

Q. That's right. So the totem pole which ranked over-all ability was just one of several factors which went into this decision concerning the layoff. Was that what you were told by these people? A. Yes, it was.

Q. Were you told also that the totem pole was used generally throughout McDonnell and was used in this instance primarily for merit pay increases? It was made up as a general rating and was not made up specifically for this layoff? Were you told that by Mr. Krone or Windsor or

anybody else from McDonnell? A. I was told that the term "totem pole" applied to a McDonnell custom.

Q. Um hum? A. Of ranking people in this fashion. I was told by Mr. Sinecki and Mr. Godefroid that the particular document had [183] in fact been made in the first two weeks of August 1964 in discharge of their specific assignment to come up with a list of names of those to be laid off.

Q. Can you identify the totem pole again, is it at tab 17? A. Yes. It is the second page after tab 17.

Q. Mr. Robertson, during your investigation at McDonnell did you ever apologize to anybody for your questions of them? A. I don't recall a specific instance. If you want to refresh my memory.

Q. Well, your testimony is you don't recall any such instance? Is that correct? A. No, I do not.

Q. You do remember questioning Mr. Sinecki, don't you? A. I questioned Mr. Sinecki, I previously testified, on three occasions.

Q. Yes. Were all of these questioning sessions at McDonnell? A. No, I testified I talked to him once at his home.

Q. What time of night was that? A. I don't recall. It was after dinner. I called him and asked him if it was convenient for me to come to see him and he indicated it was. I visited him for about forty minutes, I [184] believe.

Q. Wasn't it in the vicinity of 10:00 to 11:00 o'clock at night that you went out to Mr. Sinecki's house, to your recollection? A. I do not recall. He agreed to the meeting.

Q. Well you called him up and said, "I want to come see you." This was after dinner at his home, is that right? A. That is correct.

Q. Do you remember exactly when the meeting took place? A. I do not.

Q. Do you remember that during this meeting with Mr. Sinecki at his home that you specifically apologized to him

for your treatment of him during the day in front of his superiors? A. No, I do not remember that. I would be glad to laborate on that. I am sure I did apologize for the time-consuming nature of the investigation. It is standard operating procedure in this field when an investigation takes as long as this one to apologize to anybody with whom we had to take as much time as we had to take.

Q. Is it also standard operating procedure to call on a man after dinner in an investigation of this sort?

Mr. Gilden: I object to this. I think this is irrelevant.

[185] Mr. Foote: I think it explains some of the testimony, Your Honor, about some of the statements that were made to this man.

The Court: Overruled.

The Witness: Will you repeat the question?

Q. (By Mr. Foote) The question is whether it is also standard operating procedure to go out and visit a man at his own home during an investigation like this after you have spent part of the day with him at his place of employment? A. At that time we had a tremendous backlog. I was the only investigator for the Missouri Commission and I suspect that 10:00 o'clock at night was early. The first interview in this case was with Mr. Green. It commenced at 9:00 in the evening and concluded at 2:30 in the morning. It was the only way I could catch up with the backlog we had as I was the only investigator at that time. So, yes, it was standard operating procedure to do the work at any time of the day or night that it could be done.

Mr. Foote: One second, please, Your Honor.

I have no further questions of this witness. Now you can make your flight.

Mr. Gilden: I just have two questions, Your Honor.

The Court: All right.

[186] **Redirect Examination**, by Mr. Gilden

Q. Mr. Robertson, did you make a finding for the Missouri Commission on Human Rights? A. I made a recommendation. No finding has been made by the Commission at this time.

Q. What was that recommendation?

Mr. Foote: I object, Your Honor, on the same basis, it is not relevant, it is this man's opinion, I think that objection has been sustained already.

Mr. Gilden: Not on this basis, Your Honor. I was just qualifying him as an expert in this courtroom for the purpose of determination of discrimination, not on the basis on which he investigated the complaint for the Missouri Commission on Human Rights.

The Court: Well, I will overrule the objection, he can answer the question.

Did you make a recommendation to the Commission?

The Witness: I did.

Q. (By Mr. Gilden) What was your recommendation?

The Court: What did you recommend?

The Witness: I recommended that they find reasonable cause to believe that discrimination existed.

The Court: On what ground?

The Witness: On the ground that McDonnell had [187] discriminatorily dealt with him when he applied for transfer, discriminatorily dealt with him when they laid him off, and discriminatorily dealt with him at the time he sought rehiring.

The Court: For what reason?

The Witness: For reasons of race in the first two situations, and for reasons of race and for civil rights activities in the third situation.

The Court: What did the Commission do?

The Witness: The Commission still has the recommendation pending before it.

The Court: They have not acted upon it?

The Witness: They have not acted upon it.

Mr. Foote: No further questions, Your Honor.

The Court: Are you through with this witness?

Mr. Gilden: I am, sir, may he be excused?

The Court: Yes.

(Witness excused.)

The Court: We will recess until 10:00 o'clock tomorrow morning.

(Thereupon, the Court declared a recess until 10:00 o'clock the following day, January 13, 1970, at which time court was duly reconvened, the parties appeared and the following proceedings were had:)

[188] Morning Session

Tuesday, January 13, 1970; 10:00 O'Clock A.M.

(At the request of counsel for plaintiff, Plaintiff's Exhibits 34 through 47 were marked by the reporter for identification.)

Mr. Gilden: Your Honor, I have been supplied with the union contract between the International Association of Machinists and McDonnell Aircraft Corporation, commencing November 5th, 1962. There are three agreements here. The second one was effective November 8th, 1965, the last effective February 17th, 1969. They have been

supplied to me by the defendant and they are marked as Plaintiff's Exhibits 34, 35 and 36.

May they be introduced by agreement, Mr. Foote?

Mr. Foote: They may.

The Court: Very well.

PERCY GREEN, II,

recalled, having been heretofore duly sworn, testified further as follows:

Redirect Examination, by Mr. Gilden

Q. Mr. Green, you have been previously sworn to tell the truth in this matter? A. That is right.

Q. Now you have previously testified about your application for employment at McDonnell Aircraft Corporation July 26, [189] 1965, is that correct? A. That is right.

Q. Now, Mr. Green, was your application for employment with McDonnell Aircraft Corporation a serious application for employment?

Mr. Foote: I object.

A. (Interrupting) By all means.

Mr. Foote: I object to that question. I think it calls for a state of mind of this witness. I don't think it is a clear question, either. What does he mean by serious application?

The Court: What do you mean by that?

Mr. Gilden: Well, I will just ask him.

Q. (By Mr. Gilden) Did you want to be employed by McDonnell Aircraft Corporation? A. Yes, I did.

Q. If McDonnell Aircraft Corporation accepted your employment contract you would want to be employed by them, is that correct? A. That is correct.

Q. In the classification that you had requested? A. That is correct.

Q. At that time? A. That is correct.

[190] Q. Is that correct? A. That is correct.

Q. Now, Mr. Green, with respect to the stall-in that Mr. Foote has asked you questions about, what participation did you have in the actual planning of the stall-in? A. I had no participation in the planning.

Q. All right. The question was also asked you about the people that participated in this stall-in, is that correct? A. That is correct.

Q. Have you been involved in any civil rights activities in the Metropolitan St. Louis community? A. Yes.

Q. By reason of your experience in being involved in many civil rights activities do you normally know some of the people that participate in these activities? A. Yes, I normally know some, but there is a great number that I don't know.

Q. On many occasions people come to these demonstrations that you have never seen before? A. That is correct.

Q. Some people that will tell you they are going to be there never show up, is that correct? A. That is correct.

Mr. Foote: I object to that as leading.

[191] Mr. Gilden: He is not leading, he has already testified.

Mr. Foote: In that case I object to it as repetition.

Mr. Gilden: It is in.

Q. (By Mr. Gilden) Now on the occasion of the stall-in, when did that take place, Mr. Green? A. In October of '64.

Q. Would there be any particular reason why you would know anybody else that might be there to participate in this demonstration?

Mr. Foote: I will object.

The Court: I will sustain the objection as leading. Let him testify, Mr. Gilden.

Q. (By Mr. Gilden) Well, did you know who was going to be at the demonstration? A. No, I didn't know off-hand, no.

Q. Were you given any information by anyone else as to who was going to be there at this particular demonstration? A. I am sorry.

Q. Did anybody else tell you as to who was going to be there? A. No. A few persons said that they would participate. Some students from Washington University, you know, just persons at random.

[192] Q. How many people did you actually know at this particular stall-in or demonstration? A. About five. About five other ones, I believe.

Q. Now you have testified about your car being stopped in the line of traffic, have you not? A. Yes.

Q. How far from McDonnell plant was your automobile at the time that it was stopped in the line of traffic? A. About two to four miles, I would assume, from the building.

Q. All right. Of your own knowledge do you know whether any traffic was tied up—Strike that question. Do you know whether employees came late to work that particular morning because of the stall-in? A. I have no knowledge of such.

Q. Do you know how long you were involved in the line of traffic before you were arrested? A. Oh, about a few moments, a few minutes.

Q. Just a couple of minutes? A. Just a couple of minutes.

Q. Then you were arrested? A. Yes.

Q. Were you then led from the area to the police station? A. The first thing they did was to move the car.

[193] Mr. Foote: I think that can be answered yes or no, since he is leading his witness.

The Court: Go ahead.

The Witness: Is it all right? The State Troopers first moved the car out of the way and I was then placed under arrest.

Q. (By Mr. Gilden) All right. A. And the other persons were under arrest and they put me in the car.

Q. Was traffic flowing by the time that you left? A. Yes.

Q. You just stated in your testimony that the car was out there just for a few moments? A. That is right.

Mr. Gilden: Your Honor, I have Plaintiff's Exhibit 47, which is apparently a certified copy of the judgment in the matter of Percy Henton Green which was commenced on October 22nd, 1964, and a plea of guilty on December 5th, 1964, before Peter J. Maniscalco, Magistrate, Fifth District. I would like to offer that into evidence.

Mr. Foote: I have no objection, Your Honor.

Mr. Gilden: That is Exhibit 47.

Q. (By Mr. Gilden) Mr. Green, have you brought your tax records here with you this morning? [194] A. I did.

Mr. Gilden: I will hand you what have been marked as Plaintiff's Exhibits 38, 39, 40, 41, 42 and 43, and ask you whether these are your W-2's commencing 1965 through the year 1968? A. Yes, they are.

Mr. Gilden: I would like to offer into evidence Plaintiff's Exhibits 38 through 43.

Mr. Foote: No objection.

The Court: They may be received.

Q. (By Mr. Gilden) Now, Mr. Green, have you received a W-2 for the year 1969 as yet? A. No, I haven't.

Q. Whom did you work for in the year 1969? A. The Construction Job Opportunity Incorporated.

Q. Do you know your approximate earnings for the year 1969? A. Yes.

Q. What were they? A. Approximately five thousand dollars.

Q. Five thousand dollars? A. Up until the point I was laid off.

Q. When were you laid off? A. June 13th of '69.

[195] Q. Have you had any earnings since June 13th, 1969, in the year 1969? A. No.

Q. So then you would just have that particular W-2 that you would have coming to you for approximately five thousand dollars? A. That is right.

Q. For this particular job, is that correct? A. That is correct. Unless you know the unemployment compensation——

Q. You have drawn unemployment compensation? A. Yes.

Q. Beginning when? A. Let's see. It was either August or September.

Q. Of 1969? A. '69.

Q. How much has that been a week? A. Fifty-three.

Q. Fifty-three dollars a week? A. That is right.

Q. Are you still drawing unemployment compensation? A. Yes. It is ending soon.

Q. All right, but you still are drawing it at this time? A. Yes.

[196] Q. Do you know when it will stop? A. I think I was told it would stop at the end of this month.

Q. All right. Have you worked at all during the year 1970? A. No.

Mr. Foote: Your Honor, I assume that counsel for Mr. Green and I could stipulate that when the W-2 form comes in, which should be very shortly for 1969, that that be made a part of the record and establish his wage for 1969 rather than his estimation.

Mr. Gilden: That will be perfectly all right with counsel for plaintiff. We can mark it at this time as our last exhibit and put an A on it for further identification.

The Court: Very well.

Mr. Gilden: Let the record show the W-2 form for 1965 is Exhibit 37 as we have missed that number in the exhibits.

The Court: Very well.

Q. (By Mr. Gilden) Now, Mr. Green, going back to the time when you were working in Department 958, which was the E.E.D. Department, is that correct? A. That is correct.

Q. The work that you were performing in that department, were you performing that with other men with your experience and [197] seniority? A. In some cases; most cases, no.

Q. Now men with your experience and seniority were performing what type of work? A. Men with my experience and seniority were doing most of the sophisticated work, the more complex, the more complicated work the testing, the repair, the troubleshooting, some design and so forth.

Q. Had you ever performed this kind of work before? A. Yes.

Q. In what department was that? A. 966.

Q. For how many years had you had experience performing this kind of work? A. From 1962 up until the time that I applied there at McDonnell, I had other experience outside of McDonnell, but there at McDonnell from the time I was in Department 189 working on the nose steering gear, all the way up until the time that I finally got the transfer over into E.E.D., I was doing this type of work, testing with power on the equipment that is to be tested, the troubleshooting, the repair, and making certain modifications.

Q. Now of the people laid off in this particular department were there any lab technicians A that were laid off to your [198] knowledge? A. To my knowledge there were not.

Q. Of the technicians, then, that were being laid off in this department were lab technicians B, which was your category, is that correct? A. That is right.

Q. At any particular time did you ever ask to be placed in the classification of lab technician A? A. Yes. Prior to the time that I was being laid off there was a period whereby I was being evaluated by Godefroid. And all of the mens at that—I was told that all of the mens at that time were being evaluated. And there were raises, pay raises that were being granted. And the conversation finally got around, since I was at the top of grade B in E.E.D., I asked Bob Godefroid was there any reason why I wasn't being considered as a technician A. His reply to me was, "Well, what difference does it make? You are getting the pay raise." So I told him at that time that, you know, I would be willing to sacrifice the pay raise for the classification, because I think that I had proven myself able in doing this type of menial work that I would like to get into the area of work that I was doing prior to my transfer into the department.

Q. Men with your experience and seniority in this particular department, were they, were some of these men

classi- [199] fied as laboratory technician A? A. Yes. And they had many persons, they had some persons that didn't have near as much experience that was classified as—experience or training—that were classified as technician A.

Q. All right. Now among the lab technicians B do you have any opinion as to where you rated with respect to seniority? A. Well——

Mr. Foote: I object to his opinion testimony, Your Honor.

Q. (By Mr. Gilden) Do you know among the men that worked with you, lab technician B, in that category, whether you had more seniority or less seniority than most of these men? A. With the company I had more seniority than most of the technicians in this department.

Q. In the department? A. Also a great number of the supervisors, that is seniority with the company.

Q. Now, Mr. Green, prior to the time that you came into court I went over some of these matters with you, did I not, and some of these exhibits that I have already introduced into evidence? A. You did.

Q. Have you had an opportunity to read the job title [200] Laboratory Technician A? A. Yes.

Q. That is in this exhibit? A. Yes.

Q. I will hand that to you, that is under tab 15. Is that what you had read prior to the time you came into court? A. Yes.

Q. Mr. Green, did you have the qualification to fit the job description of lab technician A?

Mr. Foote: I object to——

A. (Interrupting) Yes.

Mr. Foote: That is calling for a conclusion. I move that the witness' answer be stricken.

The Court: Well, I don't even know what the qualifications are. I don't know what qualifications he has. I think that we ought to be a little more specific so as to get it into the record.

Mr. Gilden: All right, then, let's go through.

The Court: Go over the qualifications he has.

Mr. Gilden: That is fine, Your Honor.

Q. (By Mr. Gilden) Let's go through lab technician A, Mr. Green. Do you have that in front of you? A. Yes.

Q. Will you read the first part of that to the Court? [201] A. Where it says functions?

Q. Yes. A. (Reading) Under the direction of assigned supervision: designs, builds, calibrates, maintains, sets up and operates test equipment; designs, fabricates, assembly or otherwise prepares test samples and specimens for examinations.

Q. Have you done this work before? A. Yes.

Q. Where had you done this work? A. I had done this work there at McDonnell. And particularly in Department 189 and Department 966.

Q. All right, read on, Mr. Green. A. (Reading) Conduct or assist with laboratory or other tests and with the collection, reduction and analysis of test data.

Q. Had you done this work before? A. Yes.

Q. Where had you done it? A. At McDonnell, and particularly in Department 966.

Q. For what period of time? A. From——

Q. Just give me in months or that type of time. A. A little better than a year.

Q. Better than a year? [202] A. Yes.

Q. All right, read on. A. (Reading) Duties depending on area of assignment, performs any one or combination

of the following or similar duties, usually as these concern: research development, contractually required testing, product quality determination, or other laboratory and test functions requiring semi-professional skill and/or knowledge: 1) Develops test setups, fixtures, equipment components, specimens, and other materials, parts and assemblies necessary to tests or test facilities.

Q. Had you performed this work before? A. Yes.

Q. Where had you performed it? A. In Department 189 and Department 966.

Q. For how many months? A. For a little better than a year.

Q. Better than a year? A. Oh, yes.

Q. Go on. A. (Reading) A) Working from test requests, drawings, sketches, notes and/or verbal instructions, designs, redesigns or adapt parts and assemblies to meet test requirements.

Q. Had you done this work before? A. Yes.

[203] Q. For what period of time? A. For a little better than a year.

Q. All right, go on. A. (Reading) B) Develops equations and methods to solve problems involved in test setups or specimen design.

Q. Had you done this work before? A. Yes.

Q. Where had you done this? A. Department 189 and Department 966.

Q. And for what length of time? A. A little better than a year.

Q. All right. A. (Reading) C) Prepares layouts, drawings and sketches as required. I have also experienced this.

Q. You had done that for what length of time? A. Better than a year.

Q. In that same department? A. That is right.

Q. All right. A. (Reading) 2. Manufactures, assemblies, installs and performs other operations as required on structural and/or electrical and electronic components of test equipment, setups, facilities, specimens, or equipment for research, development and evaluation purposes.

[204] Q. Had you done this work before? A. Yes.

Q. For what length of time? A. At McDonnell, I mean in Department 189 and 966 for better than a year.

Q. All right, go on. A. (Reading) A) Layout and fabricate—I'm sorry. Lays out and fabricates these, using a variety of production apparatus, hand and/or machine tools, laboratory and other equipment, improvising as necessary to produce parts and assemblies to furnish or develop specifications.

Q. Have you done this work before? A. Yes.

Q. Was this at McDonnell? A. That is right.

Q. Same department? A. Same department.

Q. Same length of time? A. Same length of time.

Q. Go on. A. (Reading) B) Assemblies, installs and checks out test equipment, setups, facility components and test specimens.

Q. Had you done this work before? A. I did.

[205] Q. For what length of time and where? A. For a little better than a year in Department 189 and 966.

Q. Go on. A. (Reading) Installs and checks out test instrumentation in company products or test facilities such as might be required for flight or wind tunnel tests.

Q. Had you performed this work before? A. Yes.

Q. At McDonnell Aircraft? A. That is right.

Q. Same length of time? A. About the same length of time.

Q. Go on. A. (Reading) 3. Calibrates and maintains test equipments, instruments, controls and other test equipment of facility components.

Q. Had you performed this work before? A. Yes.

Q. You knew how to do it? A. That's right.

Q. Did you do this at McDonnell Aircraft? A. That's right.

Q. Same length of time? [206] A. That's right.

Q. All right. A. (Reading) A) Makes adjustments and repairs, disassembling, cleaning and reassembling as required.

Q. Had you performed this work before? A. I did.

Q. You were experienced with it? A. Yes.

Q. For what length of time? A. Better than a year.

Q. At McDonnell? A. That is right.

Q. Go on. A. (Reading) Calibrates and adjusts various measuring and test devices used for quality control of production items where such adjustment requires expensive technical training and/or require the use of laboratory or special master testing equipment.

Q. Had you performed this before? A. Yes.

Q. Experienced in it? A. That is right.

Q. For how long? A. For better than a year.

Q. Go on. [207] A. (Reading) 4. Calibrates and/or maintains special lab and related equipment such as—I can't pronounce that—a-n-a-l-o-g——

Q. Analogy? A. Analogy computers, tape recording equipment and telemetering devices.

Q. Had you performed this work before? A. Yes.

Q. Where was it performed? A. This particular performance I had done out in the flight test.

Q. In the flight tests? In what department? A. That was in Department 189, right after my transfer from Department 156.

Q. For what period of time did you perform this work? A. Oh, approximately two months or so.

Q. Go on. A. (Reading) 5. Maintains stocks of parts, materials and supplies to support research and development projects.

Q. Have you done this work before? A. Yes.

Q. For what length of time? A. Oh, for approximately seven years, because this is similar to the union type of production type work.

[208] Q. All right, go on. A. (Reading) A) Makes, assembles and repairs stock items as required.

Q. Had you done this work before? A. Yes.

Q. For what length of time? A. For better than a year in Department 189.

Q. Go on. A. (Reading) B) Determines inventory levels required to sustain laboratory functions, prepares requisitions, stores and issues stock, and maintains inventory records.

Q. Have you done this work before? A. Yes.

Q. In what department? A. 189 and 966.

Q. For what length of time? A. For better than a year.

Q. All right. A. (Reading) C) Requisitions test and safety equipment, special clothing or other items needed for tests.

Q. Had you done this work before? A. Yes, in part; partially.

Q. What part did you do and what part didn't you do? A. Well, about this portion about special clothing and [209] other items needed, if this means something other than safety glasses, then that is one thing; but if it means like working in the white room where you had to have special clothing, I hadn't had that portion, but the other, requisition test and safety——

The Court: Mr. Green, I can't hear you when you are talking together. If you get back away from him I can hear you better.

Mr. Gilden: I just wanted to see how long the document was.

The Witness: OK.

Q. (By Mr. Gilden) Go on, Mr. Green. A. (Reading) 6. Tests and checkouts new equipment, materials and supplies to evaluate their suitability or applications to company use or to assure that they meet established requirements and specifications.

Q. Had you performed this work before? A. Yes.

Q. Where was it done? A. In Department 189 and 966.

Q. For what period of time? A. For better than a year.

Q. Go on. A. (Reading) 7. Develops new and revises existing [210] procedures and specifications for laboratory or shop processes and testing.

Q. Had you done this work before? A. Yes.

Q. For what length of time? A. For better than a year.

Q. Was this all at McDonnell Aircraft Corporation? A. Yes.

Q. Go on. A. (Reading) A) Experiments with production and testing processes and equipment as required to develop procedures and specifications.

Q. Had you done this work before? A. Yes.

Q. At McDonnell? A. That is right.

Q. For what length of time? A. For better than a year.

Q. Go on. A. (Reading) 8. Conducts routine, and assists with more complex, laboratory and other tests and experiments.

Q. Have you done this work before? A. I have had that experience also.

Q. For what length of time? [211] A. For better than a year.

Q. Go on. A. (Reading) A) Reviews test requests, notes, or other data to determine test requirements, to

lay out and assemble test apparatus and to determine sequence of test setups.

Q. And had you performed that work before? A. Yes.

Q. For what length of time? A. For better than a year.

Q. All right. A. (Reading) B) Gathers, assembles and installs test setup components.

Q. Had you done this before? A. Yes.

Q. For what period of time? A. For better than a year.

Q. Go on. A. (Reading) C) Checks all units and their components to assure proper functioning during tests.

Q. Had you done this before? A. That is correct.

Q. Go on. A. (Reading) D) Operates or assists with operation of test units, observing components for indications of malfunction [212] or failure and taking corrective action to remedy these.

Q. Had you done this before? A. By all means.

Q. Where was this done? A. At McDonnell.

Q. In what department? A. 966 and 189.

Q. For about how long? A. For better than a year.

Q. All right. A. (Reading) Regulates and adjusts equipment to control test conditions.

Q. Have you done this before? A. I have.

Q. Same department? A. That is right.

Q. For how long? A. For better than a year.

Q. All right. A. (Reading) F) Observes instruments, meters, gauges, and so forth during tests and records test data.

Q. Had you done this before? A. Yes.

Q. For how long? [213] A. Better than a year.

Q. Same department? A. That is right.

Q. Go on. A. (Reading) G) Consults higher grade technicians to secure information or advice on problems that arise during test performance.

Q. Had you done this before? A. Yes.

Q. For what length of time? A. For better than a year.

Q. Go on. A. (Reading) 9. Assists with read-out, reduction, interpretation and analysis of test data and with the preparation of test reports, tables, graphs and related data.

Q. Had you done that before? A. Yes.

Q. Was that in the same department? A. Yes.

Q. Same length of time? A. That is right.

Q. Go on. A. (Reading) 10. Conducts tests, inspections and other operations on production items before, during and after assembly [214] where such operations require skills not normally possessed, or readily acquired by, production classifications.

Q. Had you done this work before? A. Yes.

Q. Same department? A. That's right.

Q. Same length of time? A. That's right.

Q. Go on. A. (Reading) 11. Prepares and maintains records and files of information relating to testing. I have experienced this also.

Q. Same length of time? A. That is right.

Q. All right, go on. A. (Reading) 12. Performs liaison work between laboratory, manufacturing and engineering groups to coordinate or follow up or lab related activities or to furnish or gather required technical data or advice.

Q. Had you done this before? A. Yes.

Q. Same length of time? A. Same length of time.

Q. All right. [215] A. (Reading) 13. Performs other laboratory and related duties as required to assist higher

grade technicians or to further scientific research and development.

Q. Had you done this work before? A. Yes.

Q. Same length of time? A. That is right.

Q. All right. A. (Reading) 14. May instruct, direct or assist non-technical and lower grade technical employees performing or assisting with projects for which he is partially or fully responsible.

Q. Had you done this work before? A. Yes.

Q. Is that for about a year? A. Yes.

Q. Same department? A. That is right.

Q. Go on. A. Here it states skills. (Reading) Requires a knowledge of basic engineering principles equivalent to two years of college training.

Q. Did you believe that you had these skills commensurate with two years college? [216] A. Yes.

Q. Can you tell us how? A. Inside of McDonnell and out, first of all with the training that I have had with the Devry Technical Institute, even though it was a correspondence training, but when I was in the service I was TDY to Fort Monmouth, New Jersey.

Q. What does TDY stand for? A. I forget now.

Q. All right, go ahead. A. But it was a special thing, even though I was drafted, I was sent to special training there at Fort Monmouth, New Jersey, to be trained around the radar and missile system, the Nike and Ajax.

Q. How long did you spend in this kind of work with the Army? A. For approximately—well, twenty-one months.

Q. Twenty-one months? A. Yes.

Q. Almost two years? A. Yes.

Q. All right. A. (Reading) Depending upon area of assignment, may require a knowledge of a specified en-

gineering field and/or the ability to use and apply certain skilled trades, practices and [217] equipment to produce work to exacting specifications. Must be thoroughly familiar with the functions, terminology, equipment and procedures of the assigned area. Necessary experience normally acquired in one to two years of laboratory technician B. Usually works under the general direction of a professional engineer or other senior technical personnel.

Q. Had you worked under other engineers and other personnel at McDonnell Aircraft? A. Yes. Moehlenkamp.

Q. Under Mr. Moehlenkamp? A. Moehlenkamp was one; well, there have been a number.

Q. Did you satisfy the requirement for that particular skill? A. Yes.

Q. Go on.

The Court: How long had you been a laboratory technician B?

The Witness: From the time that—from '63 up until the time that I was laid off.

The Court: When in '63?

The Witness: September of '63 until August of '64.

Q. (By Mr. Gilden) Go on, Mr. Green. A. (Reading) Assignments are made in the form of projects to be completed and require consideration—require [218] considerable technical judgment—let's see—technical judgment for their proper performance. Memory required to recall a variety of technical facts and procedures which are to be readily available for reference. Work may or may not be checked, but errors or failure to consider all alternatives with regard to assignments——

Q. Go on, Mr. Green. A. Wait a minute. (Reading) —assignments could result in false test data and considerably loss of laboratory and production time, materials

and equipment. Manual dexterity may be required to use a wide variety of laboratory equipment and/or production tools. Has personal contacts with engineering and production groups, usually for the purpose of gathering or furnishing information. Four to six months in assignment normally required for satisfactory performance.

Responsibility—May instruct and direct the work of non-technical and lower grade technical personnel assigned to assist with projects. Work may involve government classified information. Is usually responsible for laboratory equipment where fail to exercise a degree of care or to make required repairs and adjustments could result in the loss of operating time and repair, correction, and impair efficiency.

Physical factors—Involves a variety of non-repetitive technical assignments which allow considerably oppor- [219] tunity to vary work routine. Portions of work, such as reading and recording data from test equipment and calibrating instruments, may involve some eyestrain. May require light physical effort to set up and operate test equipment. Prolonged periods of walking, standing and working in awkward positions may be required. Certain tests such as those involving applied loads, high pressures, and high voltage and those requiring materials such as acids, unstable compounds and radioactive materials can be hazardous if established safety precautions are not followed. Usually works in well lighted, air conditioned, laboratory with frequent factory and laboratory shop area contacts.

Q. Is that the whole thing? A. That is the whole thing.

Q. Did you have any physical disqualifications under those job specifications? A. No.

Q. What about—there was a question raised about your eyes. Is there anything in your eyes that would keep you from performing this kind of work? A. No. Absolutely not. I'm not color blind and everyone in that

vicinity was well aware of that not being the case because I had to work with color coded wire. And the persons in the area, meaning Sinecki as well as Godefroid and whomever else, we wasn't strangers even though—we wasn't strangers [220] before I made the transfer over. They were well aware of the type of work that I was working with. It was the—and they knew that I was working with color coded wires and I didn't have no physical defects.

Q. Mr. Sinecki and Mr. Godefroid both knew you in Department 966, did they not? A. Oh, yes.

Q. And they knew the quality of your work there, is that correct? A. That is right.

Q. They also knew whether you had any physical disqualifications? A. That's right.

Q. And they also knew you in Department 958 when you moved to it, is that correct? A. That is right.

Q. So therefore they were moving from department to department themselves, and they knew you in the old department and also knew you in the new department? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Now there is in that particular folder, is there not, a job description for lab technician B, is that correct? [221] A. Yes.

Q. Did you have an opportunity to read that before you came into the courtroom this morning? A. Yes.

Q. At some prior time? A. Yes.

Q. Mr. Gilden: Your Honor, I don't want to read through the whole thing.

The Court: He was in B.

Mr. Gilden: He was in B, but there are a few things I want to go into with respect to the job specifications.

May I just give a general question so that I can go through it?

Mr. Foote: Maybe if I could offer, we might save more time, we will stipulate that Mr. Green was a competent average lab technician B.

The Witness: Hmmmm.

Mr. Foote: You say no?

The Witness: Well, I was above, not average.

The Court: Well, he has already testified he had the qualifications for A. So certainly in his opinion, at least, he had the qualifications for B, and they have agreed that he is an average B.

Mr. Gilden: I am not going to go through the whole thing, I just want to ask a couple of questions.

[222] The Court: All right.

Q. (By Mr. Gilden) Based upon what you read on lab technician B job classification, were you performing all of the duties that you would be normally called upon to perform under lab technician B classification? A. Yes.

Q. I mean were you actually performing that work in the laboratory? A. Were I actually performing the—I'm sorry, I don't understand.

Q. Were you actually using the skills you had and were you given the work that you should have based upon your skills? A. No.

Q. As job classification laboratory technician B? A. No.

Mr. Foote: I object to that, Your Honor. I don't think that is a proper question, asking this man's opinion which brings in thousands of factors of work he should have and so forth.

Mr. Gilden: Your Honor, the nature of this case is discrimination. And one of the allegations of discrimination is

the fact that he was discriminated against in this particular department, because he was given duties that were menial and not up to the standards and criteria of the skills that he had. [223] He can testify for the record as to whether or not they were utilizing the skills and the experience that he had.

The Court: He has already testified that in his opinion they were not.

Mr. Gilden: All right, as long as it is in there, that is all right.

Q. (By Mr. Gilden) Now at the time that you were laid off in Department No. 958 was there any other work going on in that department? A. Yes.

Q. What work was going on? A. At the time that—I was working on a panel at the time, the exact name of the panel I cannot recall. I was then in the prototype lab. However, there was still a great amount of work still going on regarding the FOH as far as McDonnell as a whole was concerned.

Q. This work was going on in Department 958, the department in which you were being laid off? A. Certain parts that was related to the aircraft itself was going on.

Q. All right. A. Also there was still various portions of work going on regarding the space program.

Q. All right. Now—— [224] A. (Continuing) There was quite a little research activity going on for bidding on various contracts and so on and so forth.

Q. Now were there other lab technicians B that were still working in that department at the time that you left? A. Yes.

Q. And there were, of course, I am sure, lab technicians A, is that correct? A. Oh, yes.

Q. Do you know how many lab technicians B were still remaining in that department at the time you were laid

off? A. No. I would assume that—Well, no, I don't know the actual number but I know that it was all white and it was only eight mens.

Q. Eight what? A. You know, eight technicians minus, which left it all white.

Mr. Gilden: That is all.

Recross-Examination, by Mr. Foote

Q. Mr. Green, you know a man named Bill Williams, don't you? Do you remember him? A. Bill Williams?

Q. Bill Williams? A. Not offhand. You might in some way refresh my memory.

[225] Q. I will try to do that. Do you remember working before you were transferred to E.E.D. in a department where you were testing the work being produced by a certain group of ladies? A. Before I transferred to where, now?

Q. Before you transferred to E.E.D.? A. OK.

Q. You, I believe, were testing certain equipment which had been produced by some other employees, most of whom or maybe all of whom were women? A. Yes.

Q. And somebody was in charge of those ladies, do you remember that person? A. Yes.

Q. The man in charge was Bill Williams. Does this refresh your recollection? A. Well, could you give me the name of the equipment that I was testing at that time?

Q. I think it was on the Titan. Does that ring a bell? A. No.

Mr. Foote: Let me have one second if I may, Your Honor.

Q. (By Mr. Foote) Mr. Green, look over there in the front row, the man sitting farthest to the left. That is Bill

[226] Williams, do you recognize him? A. Yes, I recognize him but I didn't recall his name.

Q. I understand. I am not sure I have got it right, but the work being done was modules to go into a console for the Titan, and that was the work you were checking with Mr. Williams? A. (No answer.)

Q. Well, it doesn't matter. A. Well.

Q. You recognize Mr. Williams today in the courtroom? A. Yes.

Q. You worked with him before you went into E.E.D., do you remember that? A. I don't recall that.

Q. Do you remember working with him in E.E.D.? A. I don't know. I think I recall working with him in E.E.D.

Q. OK. A. I don't know whether it was proper to say working with him or not, I don't know.

Q. But you remember him from McDonnell? A. I remember him from McDonnell; yes; vaguely.

Q. Do you have any idea how long you had known him? A. No.

Q. Now is development technician, that grade, higher than [227] technician A, do you remember? A. Is what?

Q. Development technician, a job description at McDonnell at the time you were there, was development technician higher than tech A, technician A, do you remember? A. No, I don't.

Q. You don't? A. I don't recall. I do know that A was higher than B, I know that.

Q. Yes. Do you remember ever walking through Building 101 with somebody else and seeing Mr. Williams and making a comment within his hearing, that somebody else would have been a supervisor?

Mr. Gilden: Will you pinpoint the time?

The Witness: Walking through the building?

Q. (By Mr. Foote) Yes. A. And seeing Mr. Williams?

Q. Let me pinpoint it. I think I can correct the objection. I think the objection is well taken. Let me pinpoint it to the time approximately in the summer of 1963. Do you remember walking through a building with somebody who was a supervisor, specifically Mr. Godefroid, and seeing Mr. Williams? A. No.

Q. It was your testimony yesterday, as I recall, that you [228] were given no tour of any kind of the E.E.D. before you went to work there, isn't that right? A. (No answer.)

Q. You were never shown around the building or shown the jobs and the various projects that E.E.D. worked on, wasn't that your testimony? A. I believe that is correct, and I still don't see—I still don't understand about Mr. Williams.

Q. You don't recall seeing Mr. Williams when you were walking by him working at a bench with Mr. Godefroid during the summer of 1963, is that your testimony? A. Yes.

Q. This man David Lowe, that you testified about yesterday, I believe you said was an employee who had applied to the E.E.D. and been taken on as a technician? A. No, that fellow's name was Leo Jeffress, I pointed out during the time in Department 189 who was a technician—I mean he was a radio electric mechanic, the same as I.

Q. Um hum? A. Who didn't know—he couldn't tell a resistor from a capacitor.

Q. Mr. Green——

Mr. Foote: Your Honor, I move that that remark be stricken as not responsive to the question.

[229] The Witness: (Continuing) Anyway, he was——

Mr. Foote: May I have a ruling on that, Your Honor?

The Court: It may be stricken.

Q. (By Mr. Foote) I was asking about Mr. Lowe. I remember your testimony about Mr. Jeffress. What did you say about Mr. Lowe? A. Well, Mr. Lowe, he made application for technician sometime before I did.

Q. Um hum? A. And he was—let's see, I think he said he was accepted.

Q. That was your testimony from yesterday? A. Right. He was accepted.

Q. That is your best recollection? A. Yes.

Q. He applied after you had? A. No, no, not after I applied. I say he applied before I applied in '63.

Q. To get into E.E.D. and he was accepted? A. No, to make transfer to the technician, research and development technician.

Q. On what do you base that statement? A. I base that on your question, you asked me what——

Q. You are answering the question when you say that [230] Mr. Lowe applied to become a technician in E.E.D. and was subsequently made a technician. What do you base that statement on? Who told you that? A. Oh, he did.

Q. Mr. Lowe did? A. Yes.

Q. That he applied to be a technician and later made a technician? A. No. No. He and I—Lowe and I was working on a piece of equipment, I can't recall what it was now; but he then told me that he was going over to see Mr. Birges.

Q. Um hum? A. To see about becoming a technician. He was grade I too I believe, I can't recall. So he goes over and he said he made application, then he come back and he and I both was working on a job together.

Q. Um hum. A. Quite naturally we talked. And then, oh I guess a week or so or couple of weeks or a month or so, he told me that he was called, and that he had been

accepted. Well, well at the time he said he wasn't sure whether or not he is going to go on with it or not, you know, but at least he had been accepted.

Q. Um hum? [231] A. So it was about that time, after me finding out from him that he had been accepted I believe was the time that I went on—I then went and made application.

Q. I understand. Now while you were working in E.E.D. you had to keep certain records of the work that you were doing, didn't you, to turn in at the end of the week? A. At E.E.D.?

Q. Yes, as a lab tech B? A. I believe. I don't know. I think that could have been.

Q. These records were kept by you and the other technicians describing the work that you were doing, is that right? A. That could be, I don't recall now.

Q. You don't recall keeping records and turning them in periodically while you were a technician about the amount of work you were doing and what the work consisted of? You don't remember that? A. Well, let me think about it, you know, because——

Q. Take as much time as you need. A. Well—Do you have anything to, you know, refresh my memory on that?

Q. I might, Mr. Green, but I am asking you of your own recollection at the moment.

[232] A. Well, I'm not sure. It is possible.

Q. You don't have any specific recollection now of making periodic reports on the work that you were doing, is that your testimony?

Q. I am saying that I am not, you know, sure at this moment. I mean it is possible.

The Court: Do you remember or don't you?

The Witness: Well, I don't know. If I see the evidence——

The Court: You don't remember at this point?

The Witness: I don't remember at this point.

The Court: OK.

Q. (By Mr. Foote) That was the question. A. OK. But I mean I don't want to be held saying I don't remember.

Q. I am just asking you the question, do you remember or don't you? A. At this point I do not remember.

Q. OK. At this point.

Q. OK. A. OK.

Q. What was the kind of work that you considered menial, can you describe what it was? Was it fabrication, is that what [233] you said yesterday, making the wire bundles, was that your testimony? A. Yes, menial work, any work becomes menial upon it being past experience, so to speak.

Q. I see. So if you have done it once—— A. (Interrupting) If you have done it many, many times then for many, many years then it becomes menial. It would be just like you now going back to, being forced to go back to law school to be taught something that you already know.

Q. Well, I have probably forgotten more than I used to know from law school. But apart from that, is it your testimony that what you have already done and you know how to do then becomes menial, is that your explanation of the word menial as used yesterday? A. Well, my explanation for menial was that, for Mr. Godefroid and Sinecki, knowing the type of work that I was doing——

Q. Wait a minute, Mr. Green. A. Well, this is my definition of menial.

Q. I asked the question whether the definition I just gave you was it. That is either not or it is. I wasn't asking about Mr. Godefroid or Mr. Sinecki.

Mr. Gilden: I am going to object——

Mr. Foote: I will ask the Court to instruct the [234] witness to answer the question.

Mr. Gilden: Your Honor, I am going to object to the form of the question. There has been no definition of menial given by Mr. Foote to the witness.

The Court: He can answer the question and then if that is not his definition of menial he can explain what it is.

The Witness: OK.

The Court: If you will answer the question first it will take a lot less time.

The Witness: OK. Would you restate the question again, I am sorry.

Q. (By Mr. Foote) As I understood your testimony, and correct me if I'm wrong, I am asking you now—— A. OK.

Q. ——is your definition of menial work which you have already done and which you know how to do? Is that your definition of what menial work is as you used the term yesterday? A. (No answer)

Q. In other words, work which you have mastered, which you understand, is that what menial work is as you used the word menial? A. (No answer).

Q. Do you understand the question? A. Yes. All right. My answer is yes with an explanation. [235] Yes, in other words, what you are saying is part of my definition of menial. Menial as I was using it yesterday was the mere fact that I was not only—it was work that would take very, very, very little skill in order to perform.

Q. That was your—— A. I didn't finish.

Q. OK, I'm sorry, go ahead and finish your answer. A. And that this limited amount of skill has been—could now be considered as experience, you know, in doing

such. And that it became menial because my purpose for making the transfer was not to do that type of work, you know, but to further my endeavor in the kind of work I was doing.

Q. Um hum. A. And if I had wanted to do this type of work I could have just as easily transferred to the department of 156 where this kind of work is constantly being performed.

Q. I see. A. So in that context is what I meant about menial.

Q. Um hum. I understand. Do you have any more explanation of the word menial? Is that your explanation? A. Well, I could broaden it in order to set up some various examples if you would like to.

Q. Just the definition. You have testified about the examples before. We don't need to duplicate that.

[236] Mr. Gilden: I am going to object to that, we don't have the examples in evidence. He is trying to broaden the definition. If Mr. Foote doesn't want to hear the definition let him state so, but he is trying to give a definition with his explanation.

Mr. Foote: I have——

Mr. Gilden: Let him——

Mr. Foote: Just a minute, Lou. I have let the witness testify for about four minutes or five minutes now on his definition of the word menial. I asked him if he was finished. He said he was and then he was going to give some examples. I am not asking about examples. Mr. Gilden can ask for the examples.

The Court: Proceed. Let's go.

Q. (By Mr. Foote) Mr. Green, do you remember that the work in E.E.D. was broken down into various categories for the purpose of reporting what work was done?

Do you remember that? A. Reporting what work that was done?

Q. I am referring now to the reports which you say you don't recall making out so perhaps you won't be able to answer the question. But do you have any recollection that there were certain kinds of work, for instance, fabrication work, do you remember fabrication work? A. Yes, I remember the fabrication work.

[237] Q. Was it the fabrication work that was the menial work that you didn't like? Was that what fell under the category? fabrication? A. The fabrication work that I didn't like? Well, I don't clearly understand.

Q. Well, maybe the question wasn't clear. The work which you testified yesterday that was menial, as you described it today, as I understood it, was the making of wire bundles primarily and the routine work, now is that what you call fabrication work? A. Yes. That was wire fabrication.

Q. OK. A. And that was——

Q. So if you were reporting the work that you did of making wire bundles and you were telling somebody what it was, reporting to your superiors, that you had done that day, you would have told them I was making fabrication work, is that right? A. Oh, no. I think that if the supervisor was—if the supervisor wanted to know what kind of —what kind of work I was doing, I would tell him I was fabricating, you know,——

Q. OK? A. ——wire bundles.

Q. Would you have called that engineering support? Would [238] you have called making wire bundles engineering support? A. (No answer.)

Q. That is a different category, isn't it, from fabrication as it was used in the department? A. Well, you know the term, you know it could very well mean the same, you know, but the only thing about it the words, the termi-

nology changes in time and even though if you want to call it engineering support that is a lot more sophisticated name but it is also misleading.

Q. We are talking about the time when you were a technician. If I didn't make that clear, I make it clear now, at that time as the word engineering support was used, was it different from fabrication? A. I don't recall. I don't remember that.

Q. Mr. Green, you have looked over what has been marked and received in evidence as Plaintiff's Exhibit 33 or at least parts thereof? A. Yes.

Q. I will invite your attention to the document which appears behind tab 14 of that exhibit, and I will ask you to leaf through all of the pages which are shown behind tab 14 and tell me if the signatures that you see that appear to be Percy Green are in fact your signatures? A. They appear to be on this first sheet.

[239] Q. Just leaf through all the sheets, please, and establish that that is or is not your signature in each case. A. OK. Um hum. Yes.

Q. Mr. Green, you have leafed through all of the pages behind tab 14 and you have looked at the signatures which say Percy Green, are those all your signatures? A. Yes, they all appear to be, um hum.

Q. Do those documents refresh your recollection about my question concerning the report that you made about the work you were doing? A. That is right.

Q. Did you make all of those reports in connection with your duties as lab technician B, the ones you have just looked through and examined? A. Yes.

Q. The checkmarks and the other information on there, I know you can't identify a checkmark necessarily, but to the best of your ability looking at those records, is that a record made out by you and submitted to somebody at

McDonnell? A. Yes, it looks as if it might be one of many records I made out.

Q. Let's take the first page here. Up at the top are various categories. A. That is right.

[240] Q. Going from left to right it says a unit number. Do I read that correctly? A. It look like it might be.

Q. Then eng support, e-n-g-period support? A. Um hum.

Q. What does that refer to? A. I can't recall at this moment.

Q. And next is fab period. Do you remember what that would be? A. I would assume, since I have been using the term fabrication, I would assume that would mean fabrication.

Q. Do you remember that was fabrication and the checkmarks put in the fabrication box would indicate you were doing fabrication work? A. I would assume that it would be fabrication in some fashion.

Q. Mr. Green, I understand that you would assume that. You said that before. My question is do you remember that fabrication as used on this, f-a-b- refers to fabrication work? Do you remember that, that is the question. A. Well, I don't remember, I don't know whether it means that or not; however, under this I see harness or something.

Q. What would that be? A. Harness would be a wire harness I would assume.

[241] Q. What kind of work would that be? A. Wire.

Q. Is that fabrication? A. It is a form of fabrication. You have fabrication as it pertains to assembling. Fabrication period means to assemble, right?

Q. OK. A. So therefore harness, I would assume, was just the building of a wire bundle.

Q. And that is one of the things you objected to? A. I don't understand, objected to?

Q. To building wire bundles, is that what you considered menial or did I forget your testimony? A. Well, that is a wire harness, a wire harness fabrication is menial.

Q. OK. What is this E-T E tooling, does that ring a bell with you? A. No.

Q. How about E-M-C, does that ring a bell? A. How do you know that is E-M-C?

Q. Well, that is what it looks like to me. A. Oh?

Q. Do the initials remind you of anything? A. No.

[242] Q. Do you remember them? A. No.

Q. And the last one reliab period? A. I don't know, I don't remember.

Q. On this first page are a number of checkmarks under the column marked Fab and two checkmarks under the column marked Eng Support. And off to the right side are various numbers written in. A. Um hum?

Q. Do you recall what the numbers, that is, nine, four, eight and one read diagonally from top left to bottom right refer to? What would that have indicated? A. Well, about that now, I think, for the record it should point out it said time and hours, I believe.

Q. Time and hours, that is correct. A. So it says here Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and Sunday.

Q. OK. A. All right. And it also points out here under Monday it has the number nine.

Q. That is right. Nine and then under Tuesday it has four. A. That is four.

Q. Under Tuesday it has four, and also eight, is that [243] right? A. That is right.

Q. OK. And it also—let's see—oh, I see. OK.

Q. Off to the right is the number twelve which would be the total of eight and four. Is that the way you understand this? A. I would assume it is.

Q. OK. To the best of your recollection, having looked at these documents behind tab No. 15, I'm sorry, 14, in what has been marked Plaintiff's Exhibit 33, would that reflect the work that you did for the period of time indicated on the document while you were a technician in E.E.D.? A. From here to—all of this you mean?

Q. Yes, sir. A. Restate your question again. Would this reflect what, now?

Q. There are fourteen documents between tabs 14 and 15. These are the ones we have been discussing. A. OK.

Q. My question is, to the best of your recollection, having said that this is your signature, would these documents for the period of time that they on their face say they cover, would they reflect the work that you did in E.E.D. while you [244] were working there? A. (No answer.)

Q. Take them and look at them. A. You mean for my whole entire period?

Q. No, sir. A. From the time I was transferred all the way up——

Q. No. Just for the period that they show, for the time they show. It says October 4, 1963, for the week ending, for that week would that first document at tab 14—— A. I would think so.

Q. All right. A. I would think so. But I didn't want that to be misunderstood.

Q. I am sure it wouldn't have been. You testified this morning about the civil rights activities. It is true Mr. Green, isn't it, that your civil rights activities, public activities, go back to the early part of 1960, isn't that right? A. Yes, as far back as '61.

Q. Of '61? A. Yes.

Q. When did your name start coming in the newspaper, do you remember? A. I think it was sometime in—I believe during the Jefferson Bank is one of the times.

[245] Q. When was that, sir? A. That was August of '63. It might have been mentioned—it might have been in the newspapers before then but I don't recall but I think from '63 on I do recall.

Q. OK. But you had been participating in public civil rights demonstrations since 1961? A. Peaceful, non-violent demonstrations.

Q. On the stall-in you said this morning you didn't participate in the planning for the stall-in, but it is true that you were asked a few questions about strategy, isn't it? A. No, I never was asked any questions about strategy.

Q. I am talking now about the people who were planning the thing, they never asked you any strategy questions? A. No.

Q. You are absolutely certain about that? Think back. A. Yes, I am certain that I never was asked any questions about strategy because I don't know your definition of strategy.

Q. Well—— A. My testimony was that I mentioned I was asked questions but it wasn't for any, you know, strategy purposes.

Q. Um hmm A. That I know of.

Q. How do you define strategy? Maybe that would help [246] the question. A. Well, I define strategy as, for various information for a specific purpose, you know, seeking various information for a particular purpose or aid or something of this nature, you know.

Q. You were asked were you not, Mr. Green, questions about whether or not a picket line would be good? A. Something to that effect, whether or not they thought, whether or not they thought that a picket line, would it jeopardize my chances of being rehired.

Q. But you were also asked—— A. (Continuing) Whether or not——

Q. Excuse me. A. Or whether anything at all would jeopardize the—You are speaking of '64 now, right?

Q. That is right, in connection with the stall-in. A. Yes. Whether or not any act you know, or letters or whatever else would be binding on whether or not I would be reinstated and so on and so forth.

Q. So it is your testimony that the questions that you were asked were only about the effect on your own personal status with McDonnell that any demonstrations would have? A. As far as I recall.

Q. You weren't asked questions about a place of picketing [247] or how to go about it or an ideal spot to picket or anything like that, to your recollection? A. Well, I was only asked questions pertaining to that after—you are speaking of picketing. You take for instance after the pickets—after it was decided that they—that the organization wanted to picket——

Q. No, my question was this. A. (Interrupting) It all depends——

Q. Mr. Green, do you admit or deny that you answered questions put to you by members of CORE about the ideal place to picket McDonnell? Do you admit it or deny it? A. I don't recall.

Q. Do you recall giving a deposition in this case? A. Yes.

Q. Twice, didn't you? A. Yes.

Q. Both times you were under oath, weren't you? A. That is right.

Q. Do you remember specifically the first deposition which took place on May 2nd, 1969? A. All right, I remember we had some—that I was to testify pertaining to a deposition at some time.

Q. Do you remember being asked the following questions and giving the following answers:

[248] Q. "Did you personally have anything to do with preparing those instructions?"

Mr. Foote: Mr. Gilden, I am on page 44.

A. "Not that I can recall. A number of persons was involved as far as the strategy committee."

Q. "Were you involved in the strategy committee?"

A. "No. The organization taken the position that it would be best that I didn't."

Q. "You attended no strategy meetings at all on this?"

A. "I don't think so. I was asked some questions."

Q. "On strategy?"

A. "No, I was just asked some questions you know."

Q. "What were you asked?"

A. "Such questions as whether or not a picket line would be good, where it would be an ideal place to picket and things like that, you know."

Do you remember being asked those questions and giving those answers? A. (By the witness) Yeah, I think I recall now.

Q. Does that help your memory? [249] A. Yes.

Q. That you were asked for an ideal place for putting the picket line? A. Yes. But you see the only thing, the time in which I was asked, you take for instance——

Q. (Interrupting) Now wait a minute. I think you answered my question. Were these questions asked before the stall-in? A. No. These questions was asked, these questions were asked as I recall, after the stall-in.

Q. I see. When you made these answers on the deposition were your answers referring to activities that took place after the stall-in? A. I don't know. I don't recall. As I understood it, but chances that I did mean after the stall-in. The question that you asked me.

Q. I see. A. Now being specific, if you would allow me, I would tell you exactly when those decisions——

Q. Why don't you tell me when those decisions were made? A. As far as the picket line of McDonnell was concerned——

Q. I am still talking about the stall-in. A. Oh. Oh. Well, I see. As far as the stall-in, like I say, I didn't have anything to do with the strategy on the [250] stall-in.

Q. Um hum? Now do I understand that you are saying that your testimony in this deposition was not in relation to the stall-in but was in relationship to something else? A. I am telling you that your remarks about the picket lines——

Q. Um hum? A. You know, about the conversation asking me about the picket line, where would be the best place and so on and so forth?

Q. Um hum. A. That was my understanding that you meant around the picketing of McDonnell's home.

Q. Oh, I see. You didn't understand when I was asking you these questions in the deposition that I was asking you about the stall-in? A. Not that I can recall at this moment.

Q. OK. Were there any instruction sheets prepared for the picketing of Mr. McDonnell's house to your recollection? A. Instruction sheets?

Q. Yes. No. It was—not that I can recall. I remember some leaflets.

Q. But not instructions as such with a plan on how to [251] picket to your recollection? A. No. Not to my recollection. Not to my memory.

Q. Let me ask you again about your deposition, Mr. Green. During the same deposition do you remember being asked the following questions and giving the following answers;

Mr. Foote: This is on page 42, Mr. Gilden.

Mr. Gilden: What page?

Mr. Foote: 42.

Q. (By Mr. Foote) "Look at all the documents if you will, please?"

A. "Yes."

Q. "Let's take them—" then there was some discussion by counsel about what the documents were.

Mr. Foote: Mr. Gilden, to save a moment here, can we stipulate the documents they were talking about were the plans for the stall-in, or can we not?

Mr. Gilden: I think you referred to that.

Mr. Foote: I think I did. OK?

Mr. Gilden: That is all right.

(By Mr. Foote) Q. "Look at all the documents if you will, please?"

A. "Yes."

Q. "Let's take them——"

"The Witness: It appears to be a copy."

[252] Q. "A copy of what?"

A. "Of what you just asked me, it appears to be, this looks like a copy of what the Police Department had after the arrest you know."

Q. "Does that appear to be a copy of the instructions that were handed out to the various participants in the stall-in?"

A. "It appears to be."

Q. "Well, take you time and read it."

A. "You know I can't hardly, it is so——"

Then there was some discussion of counsel, then

Q. "Mr. Green, subject to your counsel's well taken observation that this is not the best Xerox copy in the world, as far as you can tell is this a copy of

the instructions handed out to the various people who participated in the stall-in?"

A. "It appears to be a copy of what the police of the County and the State Troopers picked up from the cars you know."

Q. "But I am asking, the instructions that were handed out to you before the stall-in, as far as you can tell is this a copy of those instructions?"

A. "It looks like it, yes."

Q. "All right. On the third page of what has
[253] been marked Defendant's Exhibit 1 is written on somebody's handwriting 'Direction Sheet'. Can you make that out?"

A. "Yes, it looks like my handwriting."

Q. "Is it your handwriting?"

A. "I don't know."

Q. "As far as you can tell, is it your handwriting?"

A. "It looks like it."

Q. "Do you know who made up the pencil or pen sketch which is the fourth page of Defendant's Exhibit 1?"

A. "I don't recall right offhand."

Q. "Do you know who prepared the instructions written on the second page of Defendant's Exhibit 1?"

A. "No, I don't, I don't recall that either."

Q. "Did you personally have anything to do with preparing those instructions?"

A. "Not that I can recall. A number of persons was involved as far as the strategy committee."

Q. "Were you involved in the strategy committee?"

A. "No. The organization taken the position that it would be best that I didn't.

Q. "You attended no strategy meetings at all on
[254] this?"

A. "I don't think so. I was asked some questions."

Q. "On strategy?"

A. "No, I was just asked some questions you know."

Q. "What were you asked?"

A. "Such questions as whether or not a picket line would be good, where it would be an ideal place to picket and things like that you know."

Mr. Green, do you recall being asked those questions and giving those answers? A. I recall.

Q. Still it is your testimony that your answer "Where it would be an ideal place to picket and things like that you know" did not refer to the stall-in? A. No, it did not. It had reference to the McDonnell home. That was the way I understood the question when you were speaking of strategy and what-not. It did not have reference to the stall-in. It had reference to, you know, as I pointed out, picketing and so on and so forth.

Q. All right, sir. These responsibilities or qualifications for lab tech A that you went through in detail with Mr. Gilden, for many of those you answered that you had been doing the particular task that was described for better than a year, didn't you? [255] A. Yes.

Q. Better than a year, you said that several times? A. There at McDonnell, but my experience went beyond that.

Q. I know. How many of these jobs or these responsibilities that were described under the description of tech A were you doing at the same time? In other words, over what period of time were you doing 1 through 6 or 7 or whatever it was? A. Well I can't say specific. Sometimes the test procedures, the test procedure, you know, in tests would call for a number of those particulars would be in effect.

Q. I understand now——

A. (Continuing) Now——

Q. OK. A. At other intervals, you know, it was chances that another portion, the prepared portion would entail

something else. It is chances that I might have to call an engineer to ask him his opinion about this, that and the other thing.

Q. I would like—— A. (Continuing) Over-all I can't say any particular time.

Q. OK. A. But I can say that during the duration of time there [256] at MAC I had, you know, covered or touched on all of those, you know, in the job performance.

Q. In your answer to Mr. Gilden's questions about the length of time that you had performed the duties set out for lab tech A, when you said better than a year, did that refer to one period of time during which you performed a number of these responsibilities? A. I meant from the time that I first started there and from most of these experiences came about from the time that I was in Department 189 all the way up until the time that I applied for transfer.

Q. Um hum. A. That was the period I was speaking of.

Q. What was that period, now, in years, when was it? A. Well, let's see. I don't know whether it was—let's see, was it in '62 or '63 or '61, it must be from that period of '61 when I said better than a year. I meant from the period when I first went into Department 189.

Q. OK. A. It must have been '61 up until '63, so therefore I should have said, you know, two years or better than a year; well, I meant two years.

Q. All right. A. Then not to say that the—I had other experiences [257] out there on the flight line.

Q. I think you mentioned that, I think you mentioned those in direct testimony. A. OK.

Q. So, in other words, your testimony this morning on tech A is that you were qualified to be a tech A, and that you were surely qualified to be a tech B, is that a fair summary of it? A. No.

Q. It is not fair? A. No.

Q. Wherein is it not fair? A. I was, at the time of the transfer, you know, even though I was given a transfer as tech B——

Q. Um hum. A. ——by right, by utilizing my experience to the highest or to the best interest of the company I should have been hired as a tech A.

Q. Um hum? A. Taking these other things into consideration.

Q. Um hum? A. Instead——

Q. (Interrupting) This is your own opinion you are saying now? [258] A. I am just—if you—not only my opinion, but if you are playing it fair and square across the board, based upon what Sinecki had known, looking at my record, my job performance, inasmuch as he had been in the vicinity, you know, taking everything——

Q. In other words, you were qualified for technician B and in your opinion you were qualified for technician A, but you were given work which you thought was menial at the time, is that true? A. That is—well, I don't know how to answer your question.

Q. Could you read the question back—— A. (Interrupting) My answer was——

Mr. Foote: Let's have the question, please, then you can give your answer.

(Question read by the reporter as follows:

Q. "In other words, you were qualified for technician B and in your opinion you were qualified for technician A, but you were given work which you thought was menial at the time, is that true?")

A. No, that is not true. That is not true.

Q. (By Mr. Foote) All right. A. You say I was qualified for A.

Q. Yes. [259] A. Instead I was given B for most part. OK?

Q. OK. It is your opinion—— A. (Interrupting) Let me finish my answer.

Q. (Continuing) You applied for tech B.

The Witness: Let me finish my answer now. There isn't a great deal of difference in—on paper there isn't a great deal of difference in technician B versus technician A.

Q. I see. A. You know, once again those little nasty things are put in there for various purposes.

Q. What do you refer to now, Mr. Green, these little nasty things? A. Well, I mean you know when you look at technician B and look at technician A you can see where there is a great deal of overlapping.

Q. Um hum. A. Then a person can always say well, you are technician B.

Q. Um hum. A. Or they can always make you a technician A at their own discretion.

Q. OK. Now you were made a technician B and you did work in the department for approximately a year as a techician B and it was your testimony that the work that you did, the [260] vast majority of it you considered to be menial, is that correct? A. Yes, in relation——

Q. Is that correct or not? A. In relation to the work I was doing.

Mr. Foote: Your Honor, I think I have a right to have an answer to the question.

The Court: He can answer the question yes or no. I have told him this before and I'm not going to tell him very much more again. You can answer yes or no.

Mr. Gilden: Your Honor, he is asking for an explanation of the question. He is asking for clarification.

The Court: He can understand that.

The Witness: I don't.

Mr. Foote: Let's have the question back. If it is confusing I will be glad to modify it. Can we have it back, please?

(Thereupon, the question was read by the reporter as follows:

Q. "OK. Now you were made a technician B and you did work in the department for approximately a year as a technician B and it was your testimony that the work that you did, the vast majority of it you considered to be menial, is that correct?")

Q. (By Mr. Foote) Let's take it a step at a time. You [261] were a technician B while you were in the department, is that correct? A. That is correct.

Q. For the whole time? A. That is right.

Q. And the work that you were given to do in large part was in your opinion menial work, is that correct? A. That is correct.

Q. And your testimony was that you, in your opinion, are qualified to be even higher than tech B, is that correct? A. I stated that to Godefroid.

Q. Mr. Green, returning to your conversation with Godefroid at the time that you discussed employment, is it not correct that Mr. Godefroid told you that the work would be menial, that the work would be routine and that you were overqualified for the job, is that not true? Do you understand the question? Did he not tell you that? A. No, I don't recall him telling me that I was over-qualified.

Q. Do you not recall him telling you that the work was menial, that the work was routine and that he thought you would be better off where you were. Do you

not recall today his telling you that? A. I recall—No. No.

[262] Q. His having said that? A. Only in part.

Q. Sir? A. I only recall that in part.

Q. I am only asking the one question, Mr. Green. I can only ask them one at a time.

Mr. Foote: Your Honor, I would ask again that the witness be instructed to answer the questions. I think these questions can be answered simply and briefly. I am trying to make them as simple as possible.

The Court: What is your answer, Mr. Green?

A. My answer is that only in part because that was not the true question that I was asked.

Mr. Foote: I move that the answer be stricken as not responsive. You can answer that if it is not true. If the answer is that you don't know, that can be answered that way.

A. All right.

Q. If that is not the fact, it can be answered that way too.

Mr. Foote: Your Honor, I would ask that he be instructed to answer.

The Witness: I don't know. I don't know.

Q. (By Mr. Foote) In other words, you don't recall now that Mr. Godefroid told you that the job was below your capacities [263] and that it was not good work, that it was menial, and that it was routine work, you don't recall that?

Mr. Gilden: Your Honor, there are three questions in one question. He is asking Mr. Green to answer the truth or falseness of that statement of all three questions in one question.

If you would break that down and ask in three questions of this witness, that would be clear.

Mr. Foote: OK, I think that is a good idea.

Q. (By Mr. Foote) Do you recall Mr. Godefroid in your pre-transfer interview telling you that the work would be menial? A. No.

Q. Do you recall his telling you that the work would be routine? A. No.

Q. Do you recall his telling you that the work would be dirty? A. Yes.

Q. Do you recall his telling you that he thought you would be better off not to come into the job? A. Oh, yes, I remember that.

Q. Do you recall his telling you that there was a good chance of a layoff? [264] A. Yes.

Q. Mr. Foote: I have no further questions.

Redirect Examination, by Mr. Gilden

Q. Mr. Green, Mr. Foote has asked you some questions about your definition of menial duties and you wanted to give some examples. Could you give them to the Court? A. Yes. The example of menial duties was that Mr. Godefroid and Ed Sinecki was well aware of the kind of work that I was doing. They was well aware of some of my relationships with some of the engineers, and they knew the kind of competent work I was doing. And in lieu of them at one point of asking a radio electric mechanic by the name of Leo Jeffress, and just shoot him in directly on testing, doing some of the bread board work and so on and so forth with very, very, very little experience and know-how, and then from them to know the type of work that I was doing in 966, and then to allow me, for them to, you know, constantly throw up in my face about the chances of being laid off, the dirty

work, and then turn right around and subject me to the type of work that was far below my capacity, and they knew it.

The Court: Mr. Green, you still haven't answered the question.

The Witness: That was my example.

[265] The Court: All right. What specifically did you do that was menial? I don't know what you are talking about. You want to give some examples now give us some.

The Witness: Menial work is——

The Court: What are some examples?

The Witness: The examples of menial is the typical routine type of wiring a panel. This is something that——

The Court: All right, wiring a panel.

The Witness: Wiring a panel and taking continuity tests.

The Court: OK.

The Witness: With a flashlight battery so to speak. This is menial.

The Court: All right.

The Witness: Versus the kind of work that I was doing under power.

The Court: Give us the menial examples.

The Witness: Well, continuity testing, that in itself is menial.

The Court: All right.

The Witness: It was—Let's see. Well, that in itself was most of the work that the technician B or that I was doing. That is a broad scope. In other words, every panel that was to go into the Gemini that had to be wired you found [266] that——

The Court: That is all you did?

The Witness: That's right, that is all that I was doing.

The Court: That is all you did while you were a technician B?

The Witness: Except a few exceptions when I was given a patch board, those module cards to stick into a little circuit, that is under power and it had to be checked out. But even that in itself with the type of—in other words, I had little equipment—when I was in Department 966 I had a set that was called the Servo—I can't think of it now, but it was as large as a television, and it had to function per, you know, the engineering requirements. And it had to be tested. It had a list of operations that it had to go through, and after I ran the check on it, it also had to be trouble shot. After that I had to call a McDonnell inspector and set down with him and run the whole entire operation. McDonnell, then, had to stamp it to give its approval. And then afterwards the Navy had to come in and to approve the set, as it being an operational you know functioning and that it was assembled properly and so on and so forth. Now that was not the kind of work that I was doing after I was transferred. I brought this to Mr. Godefroid's attention when he was willing to give me a fifteen cents or [267] eleven cents raise rather than to give me the grade that I was due. And he made out as if it didn't make any difference, after all it's the money that count, and I told him this was not the case; it is the principle, and I would like to have an opportunity to do the kind of work that was the kind that I was doing before I made the transfer.

Q. (By Mr. Gilden) Mr. Green, prior to the time that the stall-in occurred in October 1964, was CORE aware of your complaints of discrimination against McDonnell Douglas Corporation? A. Yes.

Q. All right. Was that demonstration held by CORE in the nature of a stall-in to express in part the dissatisfaction with your layoff?

Mr. Foote: I will object——

A. (Interrupting) Yes.

Mr. Foote: (Continuing) ——as calling for a hearsay answer and also a conclusion.

The Court: Go ahead.

Q. (By Mr. Gilden) Prior to the time that you were laid off, and you have already testified you had some conversation with Mr. Krone, is that correct? A. That is right.

Q. Did you ever tell Mr. Krone that you were going to [268] register a protest against McDonnell-Douglas because of discrimination? A. No.

Q. You didn't? A. No. Absolutely not.

Q. Did you tell anybody in the company that you were going to register civil rights protests? A. No. That is something—my outside activities I never did bring to the people that I worked with in no fashion.

Q. I see. You did in fact, did you not, after you were laid off file a complaint with the Missouri Commission on Human Rights? A. Yes. I told Mr. Krone that it would be chances that I would file a complaint because I wasn't satisfied.

Q. You indicated you might do that? A. Yes. But nothing about no demonstrations or anything of this nature.

Q. I will turn to tab 1 of Exhibit 33 and ask you if this is the complaint that you filed in the year, rather on the date August 31st, 1964, against McDonnell Aircraft Corporation?

Mr. Foote: Your Honor, I object to the complaint, the relevance of it. I don't think it has got anything to do

with this lawsuit. This was a layoff, it is not a fact and it has nothing to do with what was going on in the department, and [269] I don't think it is admissible.

Mr. Gilden: Your Honor, there is only one other registered case under Title 7 of the Civil Rights Act, that is the Wren case. I think it went to the Fifth Circuit. It was an issue involving the same section of the Act under which this case is being brought. In that case the complainant had registered protests of conditions at the particular plant. I have the name of the defendant—it is Wren versus someone. The company then discharged him because of his action against the company, and it was held to come within that section that this action is being brought under. It is awfully material to the issue in this case.

Mr. Foote: I will withdraw the objection.

A. Yes, this is the complaint.

The Court: Which complaint are we talking about? You said yesterday you filed five complaints.

The Witness: This one is with the—this complaint here is to the Missouri Commission on Human Rights. It is—I am trying to find a date.

Mr. Gilden: It is down at the bottom, I think.

Mr. Foote: Perhaps I misunderstood the question.

The Witness: It was received——

Mr. Foote: Mr. Green, excuse me for one minute. This is the 1964 complaint that you filed?

[270] Mr. Gilden: That is correct.

Mr. Foote: And your explanation is that you are establishing by this he did not complain publicly against McDonnell-Douglas until later? What is the relevance? I am afraid I still don't understand it.

Mr. Gilden: Well, I will say it. Does Your Honor wish to have an explanation?

The Court: Well, what are we talking about?

Mr. Gilden: Well, in the Wren case, Your Honor, he registered protest of conditions at the company. Mr. Green is registering protest of the layoff as discrimination. It is part of our theory in this matter that his rehiring in 1965 was because of the fact that he filed a complaint of discrimination.

The Court: You mean his failure to be rehired?

Mr. Gilden: Yes, in 1965. This was part of the activities that he was engaged in, the civil rights protests, that occurred from the time of his layoff until the time he asked to be rehired approximately in July 1965.

The Court: Well, if you travel on that theory then all of his activities that he engaged in up to the time that he was rehired are then admissible.

Mr. Gilden: I have said they are admissible.

The Court: What?

[271] Mr. Gilden: I said they are admissible. All of his civil rights protests. But I think this is particularly directed toward McDonnell-Douglas Corporation. It is his protest of discrimination which lays the foundation for in part and parcel of the allegations of the civil rights protest.

The Court: We will recess until 1:30.

(Thereupon, the Court declared a recess until 1:30 p.m. the same day, January 13, 1970, at which time court was duly reconvened, the parties appeared and the following proceedings were had:)

Afternoon Session

[272] Tuesday, January 13, 1970; 1:30 O'Clock P.M.

Mr. Foote: Your Honor, may I say before we get started, I mentioned to Mr. Gilden yesterday that Mr. Sinecki is scheduled to go in the hospital tomorrow morning. We have a letter from his doctor to that effect. If at all possible we would like to get his testimony this afternoon.

Is that accurately stated, Mr. Gilden?

Mr. Gilden: No problem on that.

The Court: OK.

Mr. Foote: This has been scheduled for a long time.

Mr. Gilden: That is all right with me, I just want to finish this.

The Court: How much longer are we going with Mr. Green?

Mr. Gilden: I just have a few more questions. We haven't had a ruling on the last question.

Mr. Foote: I am going to withdraw that last objection. I believe the complaint is relevant. I withdraw the objection.

The Court: All right. Proceed.

PERCY GREEN, II

recalled, having been heretofore duly sworn, testified further as follows:

[273] **Redirect Examination** (Continued), by Mr. Gilden

The Court: Is this the same complaint he made before the Commission, the Missouri Commission or the Federal Commission?

Mr. Gilden: This is the old one based on the layoff before the enactment, before the effective date of the Civil Rights Act of '65.

The Court: To whom was this complaint made?

Mr. Gilden: The Missouri Commission on Human Rights.

The Court: All right.

Mr. Gilden: I would like to offer into evidence tab 1 of Exhibit 33.

The Court: I thought that was already in.

Mr. Gilden: Tab 1 was not. I offered into evidence commencing at 5, Your Honor.

The Court: All right. Do you have any objection?

Mr. Foote: I have no objection to the complaint which is in 1, Your Honor, there are a number of other documents.

Mr. Gilden: I am only concerned about the complaint.

Mr. Foote: I have no objection to that.

The Court: All right.

Q. (By Mr. Gilden) You also, I believe, testified [274] earlier that you had also filed complaints with the Navy, had you not? A. That is correct.

Q. And who else? A. The Department of Justice, the President's Committee.

Q. Would that have been done about the same time that you filed the complaint with the Missouri Commission on Human Rights? A. Yes. All five or all four or five of the complaints were filed simultaneous.

Q. That would have been the end of August in '64 then, approximately? A. Approximately, that is right.

Q. Now, at any time, Mr. Green, from the time that you started working for McDonnell-Douglas Corporation

until the time that you made application for employment in July 1965, did you ever engage in any civil rights activities in which there was any violence or injury to persons or damage to property? A. No. No. Absolutely not.

Q. Had you ever been convicted of any other offense other than obstructing traffic, that has already been introduced into evidence, during this period of time? A. During that period of time? No, I don't believe so.

[275] Q. Just one question of clarification and I think that should do it. In the question of the menial duties that you had testified rather extensively about this morning, just so there is some clarification, there were two titles, lab technician A and lab technician B? A. That is right.

Q. The duties that you were performing as lab technician B, were they considered as menial as to other duties being performed by other men in lab technician B or were they being related as menial duties with its relationship to people employed in classification lab technician A?

Mr. Foote: I will object to that question as calling for this witness's conclusion.

Mr. Gilden: We are just trying to get some clarification.

The Court: That doesn't clarify it for me.

Mr. Gilden: I will break it down somewhat.

Q. (By Mr. Gilden) Was the work that you were performing as lab technician B, was that menial as against other duties performed by other people in your same classification and with your experience in the classification of lab technician B?

Mr. Foote: I make the same objection, Your Honor. One man may call them menial, another man may not. And I don't [276] see how this question is proper.

The Court: What are you trying to ask him?

Mr. Gilden: I am trying to find out, Judge, whether— I am just trying to clarify the testimony because I was a little bit unclear this morning about certain things. I want to find out whether he considered his duties menial as against work that was being performed in the classification of lab technician B.

The Court: He said everything he did was menial as lab technician B. He has already testified to that.

The Witness: Well——

The Court: With very few exceptions. What is it you are trying to find out? Are you trying to find out do other people that he knows consider it menial?

Mr. Gilden: No, no. Here is the question I have got in my mind. He, Percy Green, considered himself qualified as lab technician A.

The Court: I understand that.

Mr. Gilden: Now did he consider the fact that he was a lab technician B as being menial as against the fact he should have been lab technician A, or were the duties that he was performing within the classification of lab technician B menial? That is the only thing I want to get cleared up.

Mr. Foote: I am still not sure, Your Honor, that I [277] understand what it is. I am sure there are very few people out there at McDonnell or any place else who don't think they ought to get more money or a better job and so forth. Mr. Green has testified extensively that he thought the work he was given was menial and that he thought he should be a grade tech A and so forth. I don't see how this testimony is relevant. It is a man's opinion about what may or may not have been menial.

The Court: I understand what he has already testified to. I don't see that your question helps the Court. I don't

see how it helps the record. Because he has already stated that he was qualified to be in A and that the things he was doing in B were menial. So what are we talking about?

Mr. Gilden: The duties he was performing in B were menial? That is the Court's interpretation? I will accept that.

The Witness: Well——

Q. (By Mr. Gilden) What is that, Mr. Green? A. Well——

Mr. Gilden: May he testify?

Mr. Foote: What is the question?

The Court: I think we have had enough testimony from him about these things.

The Witness: It is clarification, Your Honor. That is all I want to do.

[278] Mr. Foote: I would prefer that Mr. Green answer his counsel's questions in the proper procedure.

Mr. Gilden: Are you objecting then to my last question and the Court is going to sustain the objection? If so, I have it as a matter of record.

The Court: I am going to sustain the objection to the question as asked, because it isn't clear to me what you are trying to establish.

Mr. Gilden: All right.

Q. (By Mr. Gilden) Mr. Green, were your duties menial within the classification of lab technician B? A. Yes.

Mr. Gilden: All right. That is what I wanted to know.

Mr. Foote may have some questions.

Mr. Foote: Just one second.

Recross-Examination, by Mr. Foote

Q. Was it your testimony this morning, Mr. Green, since there has been the question of clarification, there were no grade A technicians who were laid off to your knowledge? A. It was my testimony, yes, it wasn't any that I know of.

Mr. Foote: OK.

The Witness: That I know of.

Mr. Foote: No further questions.

(Witness excused.)

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[279] Mr. Gilden: Your Honor, I have a subpoena duces tecum which I issued to be directed to Mr. Robert Krone. It has been in the Marshal's hands since Monday of last week. Mr. Foote and I both went into the United States Marshal's office and I think that has been verified. This is a subpoena duces tecum which ordered him to come into court as of yesterday, but apparently he was out of town, and the Marshal's notations were he would not return until the 12th. The subpoena duces tecum requested generally all the employment records of McDonnell-Douglas broken down by race and color commencing January 1st, 1964, I believe that is the date, and thereafter. Basically that is—It also covered employment records of Percy Green which have already been produced for this trial, so I am not concerned about that. But I was concerned about the employment breakdown of blacks and whites at McDonnell-Douglas for the period of January 1, 1964, to the time that, I would say to the time that he was refused hiring by the defendant.

Mr. Foote: Your Honor, I understand that Mr. Krone was served at approximately noon today. He was out of town. The records that Mr.—correct me if I am wrong—

but I believe that the records Mr. Gilden is asking for are the same records which were demanded for production and inspection earlier in this case. Is that correct?

Mr. Gilden: Generally, yes.

Mr. Foote: Those are the records which Your Honor [280] will recall would have required a number of months work by several men to prepare and to pull out. I think it was a little hazy, it is in the file, but I think there was something like six hundred thirty-five thousand records. This goes back, perhaps I might be off a little bit, but some scores of thousands at least of records that would have to be pulled and analyzed, cross-referenced, cross-indexed to figure out. At this time I would move at this late date that the subpoena duces tecum if it asks for the production of those records, and I have only looked at it briefly, be quashed on the ground that the records are not relevant to this case. This is not a pattern of action suit brought by the Attorney General. It is a private suit under a separate part of the statute. The records that have been subpoenaed do not pertain to Mr. Green. The records of Mr. Green which he has some connection to have been produced, his personnel file is before the Court, and there are a number of other records already in evidence pertaining to him. The records about the other thousands and thousands of people at McDonnell are not relevant, and I move that the subpoena duces tecum be quashed on that basis.

The Court: I don't have the subpoena, where is it?

Mr. Gilden: I assume it is in the hands of the Marshal. We both went in to see Mr. Caldwell——

The Court: I'm not going to rule on it until I know a little more about it. I don't have the subpoena and I don't [281] know what you are talking about.

Mr. Gilden: When will Mr. Krone be here?

Mr. Foote: I don't know, I guess he is waiting for a ruling on how many records. It might be a long time if he has got to produce those records.

Mr. Gilden: I can get the subpoena from the Marshal.

The Court: Let's get into this witness that we want to get out then we will talk about it during the recess.

JAMES T. CONNELL

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Gilden

Q. Will you please state your name? A. James T. Connell.

Q. Where do you live? A. At 3520 Laclede Avenue in St. Louis.

Q. What is your business or occupation? A. I am a field representative for the Missouri Commission on Human Rights.

Q. How long have you been so engaged in that employment?

The Court: Is this the man who is going to have an operation tomorrow?

Mr. Gilden: No.

[282] Mr. Foote: No, sir. That is Mr. Sinecki, an employee of McDonnell.

The Court: How long is he going to be testifying?

Mr. Gilden: It shouldn't be too long. I thought you wanted me to go on with another witness. We can put Mr. Sinecki on.

Mr. Foote: You have Mr. Sinecki under subpoena.

Mr. Gilden: I'm not going to use him.

Mr. Foote: Mr. Sinecki then will be our witness, Your Honor.

If you are not going to be too much longer I will wait until your case is finished, then put him on.

Mr. Gilden: Well, he can go on now as far as I am concerned.

Mr. Foote: May he just proceed, Your Honor, and if it gets toward the end of the afternoon put him on?

The Court: Well, go ahead.

Q. (By Mr. Gilden) You are with the Missouri Commission on Human Rights? A. That is correct.

Q. In what capacity? A. As a field representative.

Q. How long have you been so engaged in that? A. Since November 1965.

[283] Q. Where were you employed before that time? A. I was with the United States Army for twenty years.

Q. In what capacity? A. Primarily, as a special agent of the Counter Intelligence Corps.

Q. Did you retire from that agency? A. I retired.

Q. When did you retire? A. 1 September 1965.

Q. Did you have any rank while you were with the Army? A. Yes, I did.

Q. What was the final? A. Chief Warrant Officer.

Q. Chief Warrant Officer? Now, Mr. Connell, did you ever have occasion to investigate a complaint of Percy Green of discrimination against McDonnell-Douglas Corporation? A. Yes, I did.

Q. When did you undertake your investigation? A. It was about the 1st of December 1965, 1st or 2nd of December 1965.

Q. Who was your supervisor at that time? A. Peter C. Robertson.

Q. He has already testified in this case, is that correct? [284] A. Right.

Q. Did you attend any meetings at McDonnell Aircraft Corporation by reason of your duties? A. I attended one such meeting.

Q. When did that take place? A. That was about the 1st or 2nd of December, 1965.

Q. Did you review a document prior to the time that you came into this courtroom this afternoon with respect to the meeting that was held? A. I did.

Q. That is at tab 36. I will hand you what has been marked as Plaintiff's Exhibit 33, which is tab 36, and ask you if this is the document that you reviewed? A. It is.

Q. Can you tell us what that document is? A. This is a several page document which I typed up after attending the meeting and submitted it to Mr. Robertson.

Q. That is your typewritten summary? A. That is right.

Q. Does it refresh your memory as you read it? A. Yes, it does.

Q. Can you tell us how many people were in attendance at that meeting? A. Four people.

[285] Q. Who were they? A. Mr. C. H. Windsor, the personnel manager; Mr. William Langton, attorney for McDonnell.

Q. Is he here in court this afternoon? A. Yes, he is.

Q. He is sitting at counsel table with Mr. Foote? A. Right.

Q. All right. A. And Mr. Howard Morley, who was then called an employment specialist; he was also an investigator for the Department of the Navy, the contract compliance office, and myself.

Q. And yourself? Where did this meeting take place? A. In Mr. Windsor's office.

Q. Can you tell us what transpired, sir? A. Well, in general the questions were along the line of why Mr. Green had not been rehired. Mr. Windsor stated that there were a number of reasons but the——

Q. (Interrupting) Did you ask him to write the reasons down? A. I did not. As I recall, Mr. Morley did.

Q. Mr. Morley did? A. Asked that the reasons be given to us.

Q. Did Mr. Windsor give you the reasons? [286] A. No, he did not.

Q. Did he say how many reasons they had why Percy Green wouldn't be hired? A. I think he made a general statement that there might be some fifteen or twenty reasons.

Q. Why he was not hired? A. Right.

Q. Did anything else take place at that particular meeting? A. Yes. The position of the company was that they should be permitted to make a judgment decision in hiring anyone and not necessarily have to hire them on technical qualifications alone.

Q. All right. Was there any indication at that time whether they would rehire Percy Green? A. My impression was that they would not rehire him.

Q. Did they make——

Mr. Foote: I object to that answer and move that it be stricken.

Mr. Gilden: Don't give us the impressions, just tell us what they said. When I say "they" you can pinpoint the person who said it too if you know.

A. I recall that Mr. Windsor said that they would take the case as high as the Supreme Court, if necessary, rather [287] than rehire him.

Q. (By Mr. Gilden) Was anything said whether Mr. Windsor had ever written any reasons out? A. As I recall, he stated that he had written some reasons down.

Q. Why wouldn't he submit them to you?

Mr. Foote: I object to that, because he doesn't know why Mr. Windsor wouldn't submit them.

Q. (By Mr. Gilden) Did he tell you why?

Mr. Foote: May I have a ruling, please?

Mr. Gilden: I withdraw that question.

Q. (By Mr. Gilden) Did he tell you why he would not submit these reasons? A. He said he felt they would be torn apart by the people conducting the investigation.

Q. Who was he referring to when he said the people conducting the investigation?

Mr. Foote: I object to that question. This witness couldn't know whom he was referring to.

Q. (By Mr. Gilden) Did he tell you who he was referring to? A. It seems to me he said something about the people in Washington or something of that sort, but I don't know that he said specifically any one by name.

[288] Q. Was there any comment made of what would happen in the event Mr. Green were taken on for employment? A. Yes. Mr. Windsor stated that he believed the company to be an equal opportunity employer; that they had numerous black and white employees who worked together harmoniously; and that he believed that it was possible that if Mr. Green were rehired, he might be in effect an agitator and cause disruption of these harmonious relations.

Q. Was anything stated at this meeting about Percy Green's climbing the Arch? A. Yes. As I recall, Mr. Windsor said that Percy Green's actions in climbing the Arch and his other civil rights activities in the St. Louis area

would not affect, would not have any bearing on whether he would or would not be rehired.

Q. But he did comment about Mr. Green climbing the Arch? A. He did say, yes.

Mr. Foote: He answered that, didn't he? Did you answer that question?

The Witness: Yes, he did comment about that.

Mr. Foote: I thought I missed it.

Q. (By Mr. Gilden) While you were there were any personnel records submitted to you by McDonnell-Douglas showing the composition of blacks and whites in employment? [289] A. No. I received no records whatsoever on that occasion.

Q. Did you examine any records that were presented to you by Mr. Windsor as to people that had applied for employment? A. Not to my recollection.

Mr. Gilden: I am finished with the direct examination.

Cross-Examination, by Mr. Foote

Q. I am not sure I got one of your answers. Mr. Connell, did you testify that Mr. Windsor stated at this meeting that any civil rights activities that Mr. Green may have been involved in would not be a factor in the decision of McDonnell? A. Any civil rights activities not pertaining to McDonnell.

Q. That was in answer—— A. (Continuing) In other words, climbing the Arch and that sort of thing.

Q. Climbing the Arch and that sort of thing? A. Yes.

Mr. Foote: No further questions, Your Honor.

Mr. Gilden: No further questions.

The Court: Thank you, sir.

(Witness excused.)

Mr. Foote: That exhibit has not been offered into [290] evidence, is that correct?

Mr. Gilden: That is correct.

The Court: What exhibit is that?

Mr. Gilden: Tab 36 of Exhibit——

Mr. Foote: Exhibit No. 3, isn't it?

Mr. Gilden: Exhibit No. 33, tab 36.

The Court: You are not offering that in evidence?

Mr. Gilden: I have not offered it.

BETTI GREEN

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Gilden

Q. Will you please state your name? A. Mrs. Betti Green.

Q. You are the wife of Percy Green? A. Yes.

The Court: Mrs. Green, will you pull up a little closer to the microphone so that we can all hear you?

Q. (By Mr. Gilden) Are you employed?

The Court: If you need to adjust that microphone downward, you may do so so that you can speak into it. Fine.

Q. (By Mr. Gilden) Was your maiden name Betti Ruffin? A. Yes, it is.

[291] Q. Have you a business or occupation at the present time? A. I am a registered nurse anesthetist.

Q. Where are you located? A. At Homer G. Phillips Hospital.

Q. How long have you been engaged in that employment? A. Approximately twelve years.

Q. Now did you have occasion to go with your husband to the offices of McDonnell Aircraft Corporation in July of 1965? A. Yes, I did.

Q. Do you know what date that occurred? A. I think it was a Monday, July 26.

Q. 1965? A. Yes.

Q. All right. Were there any other people that went along with you other than you and your husband? A. No.

Q. Just the two of you? A. Yes.

Q. You went to the employment office of McDonnell Aircraft Corporation? A. Yes.

Q. Is that correct? A. Yes.

[292] Q. What time did you arrive? A. Between 8:00 and 8:30 in the morning.

Q. Was an application for employment given to your husband at that time? A. Yes, it was.

Q. Was it given to him immediately upon entry or some time later? A. Immediately when he requested it.

Q. Did he fill out the application in your presence? A. Yes.

Q. Now did anything unusual occur after he filled out the application for employment? A. Very unusual.

Q. What occurred? A. Well, we went back to a waiting room and sat until we thought his application was processed and he would be called for an oral examination or an oral interview. While we were sitting in the waiting room approximately four to seven uniformed and plainclothes detectives came and took strategic points outside the door and around the room and peered and peeped at us.

Q. How did you know that they were detectives if they were not in uniform? A. Because one was a black detective that I personally [293] know.

Q. All right. A. I knew him in high school.

Q. All right. A. And Percy said the others were, and of course those in uniform, I assumed were McDonnell guards as they were in uniform and it was obvious that they were.

Q. All right. A. It was a frightening experience, you know, the entire thing.

Q. Then what happened after they took their position? What occurred? A. Well, nothing except the peeking and peering around.

Q. I know. Did anybody take Mr. Green's application, your husband's application? A. Yes, before they appeared he had given his application to the gentleman at the window.

Q. All right. Do you know whether his application was given to anyone else or did you see anyone else receive it? A. No.

Q. What? A. No, I did not.

Q. How long did you remain in the employment office? A. We were there approximately thirty minutes.

[294] Q. All right. Other than Mr. Green making out the application and turning it in to a certain person, is that correct? Was it a man or a woman? A. I think it was given to a woman and there was a man at the window that he was waiting to talk with.

Q. Were you told to wait? A. Yes.

Q. How long did you wait before you were talked to again? A. I think we waited until the detectives and policemen appeared and then Percy went to the window and asked if he were going to be talked to or if—he wanted to inquire what was happening to his application.

Q. Now, Mrs. Green, did someone come back and talk to you or to your husband at that time? A. At the window, yes.

Q. What was stated to your husband? A. It has been so long and I am not certain of the exact words, but I can give you the gist of the conversation.

Q. Just give us that. A. The man came and said that Percy should leave and he would call him and let him know how the application would be processed.

Q. Now were these other people still in attendance that you had talked about, the security people? [295] A. Yes.

Q. After they made comment to your husband, Mr. Green, at that time, did you then leave? A. No.

Q. What happened then? A. Well, Percy asked if he could talk with or see the gentlemen's immediate supervisor. He persisted, Percy persisted, he wanted to follow through with the application because in Sunday's paper there had been an emergency advertisement for jobs in this position for which Percy was qualified and they were supposedly hiring, I think it was at least twenty of these technicians. They wanted them immediately, it was for immediate employment.

Q. All right. Now did Mr. Green then wait there for some response from someone else? A. Yes.

Q. How long did you wait before someone else responded to you? A. Probably another ten minutes.

Q. Who came to talk to you then? A. The same gentleman.

Q. What did he say? A. He said that we should leave, that they would call Percy and they would process the application; they were not [296] going to be hiring that day.

Q. Did anything else happen after that? A. Well, something happened after we left, we decided to leave.

Q. Then what occurred? A. Then the McDonnell guards followed us completely out of the building and out of the driveway.

Q. You mean in an automobile or walked in back of you? A. They walked with us and when we got into the automobile, the automobile followed us.

Q. So they actually followed you to your car, and you entered your car, and the car followed your automobile until you left the property of McDonnell Aircraft?

Mr. Foote: Your Honor, I know this is not a jury trial but I think he is leading the witness. I think Mrs. Green should testify.

Mr. Gilden: It is what she already stated, I am just asking for clarification.

The Court: What is your objection?

Mr. Foote: My objection is that the question is leading. There were about five questions put together. I know it is not a jury trial, but I prefer to hear it from Mrs. Green.

The Court: Refrain from leading the witness. Proceed.

Q. (By Mr. Gilden) Mrs. Green, how long did it take you [297] to get from the employment office off the property of McDonnell Aircraft, if you know? A. Three to five minutes.

Q. All right. Anything else happen unusual between the time that you entered and the time that you left other than what you have already testified to? A. I can't remember anything, Mr. Gilden.

Q. I believe you have already testified you were not married to Mr. Green at that time? A. No, I was not.

Q. When did you marry Mr. Green? A. At Christmas Day, December, 1965.

Q. To your knowledge was Mr. Green employed or unemployed on the date that he made application at McDonnell? A. He was——

Q. Let me finish, at McDonnell Aircraft Corporation? A. He was unemployed.

Q. OK. He was unemployed? A. Yes.

Mr. Gilden: You may inquire.

Mr. Foote: No questions, Your Honor.

The Court: Thank you, ma'am.

(Witness excused.)

The Court: Call your next witness.

[298] Mr. Gilden: Your Honor, I want the Court to take judicial notice of the case of United States of America vs. The Sheet Metal Workers International Association, decided on September 16th, 1969, by the Eighth Circuit Court of Appeals in which I believe there was testimony placed in this court and also take judicial notice of the fact that the case was based upon the discrimination at the Arch.

I would like to introduce into evidence the deposition of——

The Court: Well that case was not based on discrimination at the Arch. It was based on discrimination by two unions, and as far as the evidence is concerned in my court it had nothing to do with the Arch.

Mr. Gilden: The unions were not working on the Arch at that time, Your Honor.

The Court: I don't know whether they were or not. There was no testimony in my court about it. There was another case involving the National Labor Relations

Board, but it wasn't that case. That was not in my court, and that case was not appealed. I don't know what the testimony in that case was.

Mr. Gilden: I would like to offer into evidence the deposition of Howard Woodrow Morley taken on behalf of plaintiff on September 19th, 1969. At the time the deposition was taken Howard Woodrow Morley was a resident of the City of Cleveland, State of Ohio, and at the time the deposition was taken the [299] witness was informed that it was an evidentiary deposition.

Mr. Foote: Your Honor, I will be glad to stipulate that Mr. Morley is outside the jurisdiction of the Court and the subpoena power, and that he was informed that it was an evidentiary deposition, but I object to accepting the entire deposition into the record. I think the proper procedure is to read the questions and answers just as though Mr. Morley were here, subject to objections reserved to the time of the trial.

Mr. Gilden: I thought it would expedite matters if Your Honor could read the deposition and rule on the matters that have already been objected to.

The Court: Were the objections made at the time?

Mr. Gilden: Yes.

Mr. Foote: I think a number of objections were made, Your Honor.

Mr. Gilden: I am not going to object to anything else, I have already placed my objections in the record and I will stand on those.

Mr. Foote: Mr. Morley's testimony, Your Honor, in this deposition was objectionable in my opinion for a number of reasons. Some of the reasons I stated; some of them, as I told Mr. Gilden, I was reserving until the time of trial. A large part of this deposition was Mr.

Morley's conclusions about what he learned in investigation at McDonnell-Douglas, which I think [300] are objectionable on the same basis as the conclusions that were asked for yesterday and I maintain the objection to introducing the whole deposition.

Mr. Gilden: I believe Mr. Foote's objection is already on record, Your Honor, in the deposition. I might be mistaken.

The Court: Well, the Court will accept it subject to the objection which is made and I will rule on that.

Mr. Gilden: Fine.

Mr. Foote: All right.

Mr. Gilden: Your Honor, I would like to offer into evidence affidavits filed with this Court by the Southwestern Bell Telephone Company, which is Plaintiff's Exhibit No. 44. I don't know whether the original of that exhibit has already been filed with the Court or not. I have a copy of the affidavit.

Mr. Foote: I object to this affidavit being accepted into evidence on the ground that it is irrelevant for two reasons: Number one, this company, the Southwestern Bell has nothing to do with this suit; number two, this evidence also might be relevant in a pattern of discrimination suit but that is not the kind of case this is. It is not relevant evidence.

Mr. Gilden: I think we can probably expedite matters. I have had Exhibits 45 and 46 marked, 45 and 46—45, Your Honor, is employment patterns in the utility industry, 1966 to [301] 1967 and I believe when I argued some motions——

The Court: Let me see what that is.

Mr. Gilden: These have already been read, I believe, to the Court last week.

The Court: What portions of those do you intend to offer?

Mr. Gilden: Your Honor, the only portions that I would offer would be the employment records in utilities in St. Louis. I think there is a certain table, I am not concerned about the summary or the comments of the Equal Employment Opportunity Commission.

Mr. Foote: Your Honor, I would add to my objection for the report and the technical summary which are 46 and 47, that there is a further ground of irrelevancy, those reports show on their face they were made up for a period after 1966, which is at least five months later than this plaintiff came in and asked for employment. It is certainly irrelevant on those grounds. There is a further ground on which they are objectionable, they are hearsay. The evidence in there is at least second-hand and perhaps third-, fourth-, or fifth-hand. I don't know how they got those reports, what the figures mean, who provided them or anything else.

Mr. Gilden: May I comment to that?

The Court: Yes, you may.

Mr. Gilden: Your Honor may recall that when we argued [302] this matter last week, at that time I asked Union Electric and Laclede Gas to submit the data that they supplied to the Equal Employment Opportunity Commission in the year 1966. Your Honor may recall, and I am sure the record will reflect, you told me that I could bring this into court this morning, that would be Monday morning, and that I could introduce the figures for the Federal Government which they would not have to supply and we would be able to use this document.

The Court: It was my impression at that time that you had the figures for the years 1964-65.

Mr. Gilden: No, I said '66. In fact, that was argued before Your Honor because you said to me, or Mr. Foote said, if they were discriminating in 1966, it doesn't necessarily mean they discriminated in '64 and '65. And Your Honor may recall my comment in response, that the purpose of—the Civil Rights Law of 1964 had a purpose, and Congress had a purpose in enacting the legislation that there was discrimination in '64 and '65. And there was a purpose and a reason for the legislation. It is almost parenthetically proved that if there was discrimination in '66 there was obviously discrimination in '64 and '65. It is a rather basic sort of premise.

Mr. Foote: I don't think it is a basic sort of premise at all. Regardless of any parenthetical reference, this is hardly proper evidence. If this evidence is relevant to come in here, what other companies were doing at a time a [303] year or so after Mr. Green came for employment, I don't believe this is the way to get it in evidence. It is third-hand, and there is no opportunity for cross-examination. These companies themselves are presumably on trial here now if this is accepted into evidence, Your Honor, without any opportunity to cross-examine the allegations that are made in that report or put in the proper perspective, and I don't think it is fair to those companies.

The Court: I don't know exactly what I said when you argued this motion. But certainly I would not require those companies specifically to bring in their records for the year 1966. I wouldn't permit a compilation of material without any testimony as to how it was gathered to be put into evidence.

Mr. Gilden: Well, Your Honor, I have been foreclosed then in this matter, because you have told both counsel for Laclede Gas and Union Electric they did not have to come—their witnesses didn't have to come to this courtroom.

Mr. Foote: Mr. Gilden, that is not——

The Court: Wait a minute, that is correct. Now we have admitted, and I have admitted this thing which shows what Southwestern Bell had in one day, December 31st, 1964. That will be admitted. Proceed.

Mr. Gilden: Then I will make an offer of proof on exhibits.

The Court: All right. Let me see what this is about. [304] Do you know, Mr. Gilden, what this purports to show?

Mr. Gilden: I thought it follows the same data material of the Federal Commission, I put sort of a tab in there.

The Court: What years?

Mr. Gilden: '66, I believe, Your Honor.

The Court: It doesn't really show that.

Mr. Gilden: I thought it did; maybe I am mistaken.

The Court: Here, you make your offer of proof.

Mr. Gilden: Does that cover then both exhibits?

Mr. Foote: 45 and 46.

Mr. Gilden: On 45 and 46 I want to make an offer of proof first, as to Plaintiff's Exhibit 45. I want to make it on two bases that—before I make the offer of proof I just want to state for the record that when this matter of the Motion to Quash the subpoena of Laclede Gas and Union Electric came on for argument last week I requested the figures at that time for the year 1966 from Laclede Gas and Union Electric. The Court, I believe, made an order at that time asking Union Electric and Laclede Gas to bring their affidavits in for the years 1964 and '65 as to whether they had any figures, and they supplied the Court with the information that they had no figures to give the Court. But we do have the

figures for the year 1966, I want to make an offer of proof that based upon the census of 1960, per cent Negro population of the entire country [305] was thirteen point nine per cent, in St. Louis, Missouri, employment all industries ten point six per cent. Percentage of Negroes in utility industry, three point four per cent. Per cent Negro white collar employment was three per cent all industries. Utilities industry, two per cent. Per cent Negro craftsmen, all industries, three point eight per cent. Utilities industry, zero. That is based upon a document entitled Employment Patterns in the Utilities Industries, 1966 to '67 of the Office of Research and Reports, Equal Employment Opportunity Commission, Washington, D.C. It is titled Research Report 1968-26. The date underneath is June 1968. I have read from Table 4 of this document.

I wish also to make an offer of proof as to Exhibit No. 46 entitled Technical Report No. 2, Employment Practices of Selected Missouri Public Utilities Natural Gas and Electric by Roger Miller, Director of Pattern Surveys, Missouri Commission on Human Rights, dated June 30th, 1966. Maybe Your Honor is correct, I don't see any date on this. I thought it was 1966. It was prepared June 30th, 1966, so therefore it must have been based upon figures supplied prior to that date. It is titled Appendix A-3, Employees reported by three gas and/or electric operations serving Kansas City or St. Louis. And it shows occupations, male employees—may I just make an offer of proof of Appendix A-3 in its entirety?

The Court: Very well.

[306] Mr. Gilden: Mr. Foote, will you be sworn, please?

EDWARD T. FOOTE

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Gilden

Q. Will you please state your name? A. Edward T. Foote.

Q. You are a licensed practicing attorney in the State of Missouri? A. I am.

Q. Are you associated with the firm of Bryan, Cave, McPheeters and McRoberts? A. I am.

Q. You have been the attorney, have you not, for McDonnell Douglas Corporation during these proceedings? A. I have been the most active one on behalf of McDonnell-Douglas, yes.

Q. Are you familiar with the billing policies of the firm with respect to McDonnell-Douglas Corporation arising out of this proceeding?

Mr. Foote: Your Honor, I object to that question on the basis of relevance. I don't see what the billing procedures of McDonnell-Douglas has to do with this case.

The Court: What do you mean, the billing procedures?

[307] Mr. Gilden: Billings, Your Honor, for attorney fees arising out of this proceeding. I would like the Court to note the case of Newman versus Piggy Park that went to the Supreme Court of the United States. I don't have the case in front of me.

Mr. Foote: I have it.

Mr. Gilden: You have it?

(Thereupon, there was a document handed to Mr. Gilden by Mr. Langton.)

Mr. Gilden: I don't know whether this—this case doesn't have that, but I believe Your Honor under the law I am entitled to receive——

The Court: Let's have a specific case.

Mr. Gilden: I don't have that in front of me at this point.

The Court: Are you trying to ascertain from him how much he is charging McDonnell for representing them?

Mr. Gilden: That is correct, Your Honor.

The Court: And you object to it?

Mr. Foote: I object to the relevance, Your Honor. Whatever has been charged McDonnell in this case, and I honestly don't know, that is the answer, but whatever it is, I don't believe is relevant to his cause of action which is his reasonable attorney's fees. Maybe he has spent twice as much time as we have, I don't know.

[308] The Court: Is your answer to the question you don't know what the billing has been?

The Witness: I do not know what the billing has been, if any. But I would like a ruling on the objection in case he wants to call the bookkeeper or something.

The Court: I will sustain the objection.

Mr. Gilden: You can step down, Mr. Foote.

(Witness excused)

Mr. Gilden: Do you want to swear me?

LOUIS GILDEN

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Testimony, by Mr. Gilden

Mr. Gilden: My name is Louis Gilden. I am licensed to practice law in the State of Missouri. My office is at 722 Chestnut. I have been retained by Percy Green in his claim against McDonnell-Douglas Corporation, and I have represented him from the commencement through all of these proceedings. In the course of my representation I have approximately one hundred twenty-five hours in representing him in time expended in this matter. Under the minimum fee schedule of the, I think it has been given out by the Bar Association of the [309] City of St. Louis, I am not sure, it is either the Bar—I have the manual back at the office, Your Honor—I think the minimum fee schedule is thirty dollars per hour, and whatever that computation would be, it would be around thirty-six hundred dollars or thereabouts.

Mr. Foote: I have no questions, Your Honor.

The Court: You're excused.

Mr. Gilden: Will Your Honor take note the census of 1960 with respect to—of the United States Government—with respect to black and white individuals in this country?

The Court: No, you can introduce it in evidence if you want to.

Mr. Gilden: May I supply it to the Court later as an exhibit? I don't have it here this afternoon.

Mr. Foote: Your Honor, I have no objection to his supplying it later, but I would object to it as evidence on the basis of relevance. I don't think it is relevant to this case.

The Court: What is it you are trying to show based on the number of blacks and whites in the country in the 1960 Census that there are not that portion of them employed by McDonnell?

Mr. Gilden: By McDonnell-Douglas Corporation.

The Court: What is the question?

Mr. Gilden: What does the census show, you mean?

[310] The Court: Yes.

Mr. Gilden: The census I read was around thirteen point six per cent. I read from the exhibit prepared by the Equal Employment Opportunity Commission of the St. Louis area.

The Court: Is that what the national census shows?

Mr. Gilden: Thus based upon their table——

The Court: Well, assuming that to be a fact, what is the relevance in this case?

Mr. Gilden: Well, Your Honor, Mr. Green has stated that there have been civil rights protests, picketing and other demonstrations against McDonnell-Douglas, and his participation in them was not only because of his problem with McDonnell-Douglas but also because of racial patterns in the defendant industry or the defendant, rather. And if they were discriminating against blacks during the period of time that these protests were taking place it offers validity to the protests, and it would lend support to his claim that the reason he was rejected for employment, it leads to the conclusion that the reason that he was rejected for employment in '65 was based upon his

protests. If that protest was based upon an actual fact of discrimination it would lend strong support.

The Court: By discrimination do you mean the fact that they hadn't hired the same percentage of blacks as there are in the population?

Mr. Gilden: That is correct. That is right.

[311] The Court: You don't consider that to be illegal discrimination, do you?

Mr. Gilden: I would say there has to be some relationship between—I wouldn't say that in all categories across the board that discrimination lies, based upon the fact that you haven't employed thirteen point nine per cent.

The Court: Let me ask you this. Does the '64 Act specifically provide that if there is an imbalance in people because of their religion or because of their race or because of their sex that nothing in the Act shall require them to hire enough to make up that imbalance?

Mr. Gilden: I don't think there is any question about that, Your Honor.

The Court: All right, then, under what theory do you say that because they don't have the number of blacks or any other denomination it becomes discrimination?

Mr. Gilden: Well, Your Honor, I take a different view as well of the '64 Civil Rights Act. I take a broader look at it. I also incorporate with that Section 1981 which is now being interpreted in various decisions with respect to the fact that any discrimination even prior to 1964 Act would be grounds for a cause of action, even though Congress had not enacted anything other than the '64 Civil Rights Act. Section 1981 had been enacted by Congress in something like 1856. There have been claims of discrimination arising out of [312] Section 1981. Under that section there have been interpretations by the courts with

respect to that section. And it is my theory of this lawsuit, even though the '64 Civil Rights Act had not become effective during this period of time, that there was discrimination and a cause of action lying under Section 1981. Therefore they were in fact permitting unlawful practices in not hiring more blacks that were qualified in various jobs.

Mr. Foote: I would just add this to that statement, Your Honor, that this lawsuit for two years now has been been brought under this 1964 Civil Rights Act. 1981 was never pleaded. I am trying to rack my memory, but I think this is the first time I have heard of it. If the theory of this case was under a different statute going back to 1790 or whatever the date was, Jones versus Mayer and the rest of them, certainly there hasn't been any evidence so far that that is the case. Also it is not pleaded. It is far beyond the scope of the issues raised by the pleadings in this case which we have been hammering out for two years now.

The Court: Well, I will exclude the evidence about the blacks and whites in the country in the year 1966.

Mr. Gilden: Your Honor excludes it?

The Court: Right.

Mr. Gilden: May I make an offer of proof by supplying it later?

The Court: Yes, you may.

Mr. Gilden: Your Honor, I wish to read from the deposition of Mr. Robert C. Krone, deposition taken September 3rd, 1969.

Mr. Foote: I object to the reading of Mr. Krone's deposition. He is under subpoena, as I understand it. I was so informed at noon today. He is available to testify. I object to reading his deposition in his absence while he is under subpoena.

Mr. Gilden: As an admission against interest, Your Honor, in this matter.

Mr. Foote: What?

Mr. Gilden: Mr. Krone testified that he, at the time the deposition was taken, he was vice president of personnel of McDonnell-Douglas Corporation.

Mr. Foote: Wait a minute. I have an objection pending.

Mr. Gilden: I am not reading the deposition, I am just arguing.

Mr. Foote: I thought you were reading the deposition.

Mr. Gilden: No, I am not reading the deposition.

The Court: Go ahead.

Mr. Gilden: He is vice president of personnel of McDonnell-Douglas Corporation, and there is an affidavit that has been supplied by Mr. George Roudebush. I believe that is in [314] the file. It reflects that Mr. Krone was in the chain of command, I am not sure whether Mr. Krone or Mr. Windsor or Mr. David Lewis. He was in their employ, and I think I can read from the deposition as an admission against interest.

Mr. Foote: I believe when a witness is under subpoena and available his deposition may be used as admission against interest if such it be during cross-examination of the witness after direct examination. Mr. Krone is under subpoena. You have got him.

The Court: Why don't you use Mr. Krone?

Mr. Gilden: All right, is he available?

Mr. Foote: That raises the issue of the subpoena duces tecum which perhaps we can take up now.

The Court: Is the only purpose for which he is subpoenaed just these records?

Mr. Foote: I don't know what the purpose is.

Mr. Gilden: Also with respect to testimony, Your Honor, that I want to elicit from him.

The Court: Are you going to use Mr. Krone as a witness?

Mr. Foote: I don't know until he is through, Your Honor. If he uses him I will not. If he does not I will have to determine what the evidence is when he is through with his case.

The Court: Let's take a recess and the lawyers can [315] come to my chambers during the recess and get that subpoena and find out what it says.

(Temporary recess.)

(During the recess, at the request of counsel for defendant two documents were marked by the reporter for identification as Defendant's Exhibits B and C respectively.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Mr. Gilden: Your Honor, I am going to read from certain depositions here. The first being that of Charles L. Windsor. That was taken May 9th, 1969, on behalf of plaintiff.

Q. "Now, you were aware that Percy Green had climbed the Arch, were you not?"

A. "Yes."

Q. "Were you also aware——"

Mr. Gilden: This is on page 39, Mr. Foote.

Q. "Were you also aware that he had been involved in civil rights activities around the Southwestern Telephone Company and Union Electric Company?"

A. "I was aware of that."

I believe that is all we had on that page.

The deposition of Mr. Robert C. Krone was taken on behalf of plaintiff on September 3rd, 1969. Page 22 of that deposition,

[316] Q. "In the fall of 1964, were you ever called upon by various branches of the Federal Government to account to them as to the number of black employees and number of white employees that you had?"

A. "Yes, I think so."

Q. "Now, how did you keep that particular record?"

A. "It was company-wide."

Q. "What?"

A. "The record was company-wide. We didn't keep it by department."

Q. "Where was that record kept?"

A. "In my division, in the Personnel Division."

Q. "And do you still have that record?"

A. "Yes."

Q. "And where is it located?"

A. "You mean right this moment?"

Q. "Yes, sir."

A. "Probably in the personnel record section of the McDonnell Aircraft Company."

Q. "And how is it identified?"

A. "Today's record, or the 1964 record?"

Q. "1964."

A. "Probably a report to the President's Committee on equal employment opportunities. Before [317] the committee was established, it may have been for Plans in Progress. As a matter of fact, that was not a government official organization; it was a private organization made up of volunteer companies."

Q. "Plans for Progress?"

A. "Plans for Progress."

Q. "Would you have a file under Plans for Progress at the present time?"

A. "Yes."

Q. "And would that record be kept in there?"

A. "This 1964?"

Q. "Yes."

A. "It could be. It could have been."

Q. "It could be in another file known as Report to Office of Equal Employment Opportunity?"

A. "No. The President's Committee."

Q. "The President's Committee on Equal Employment Opportunity?"

A. "I think that was the name of it."

Q. "Now, would that report have indicated the departments of the McDonnell Company?"

A. "No."

Q. "How would the breakdown be shown?"

A. "Number of personnel by functional category."

Q. "Now, by functional category, what do you [318] mean by that?"

A. "Just as an example: Executives, sales, professionals, skilled, semi-skilled, unskilled, laborers."

Q. "Would that also include sex differences?"

A. "Men and women, I think; yes."

Q. "Would it be broken down: White male, black male, black female, and white female?"

A. "Yes."

Q. "And you would have all that?"

A. "That is the form as I recall it; yes."

Q. "And it would break itself down into various categories, which you call professional, labor, various categories of labor?"

A. "Degrees of skill; right."

Q. "Now, you have that for the year 1964?"

A. "I don't know. I presume that we do. I couldn't swear to it today."

Q. "Do you have it for the year 1965?"

A. "I couldn't tell you. I presume that we do."

Q. "And where would the year 1965 be located?"

A. "The same place as 1964."

I think that is as far as I am going with him.

On page 34:

[319] Q. "Did you refresh your memory somewhat, sir, as to whether or not the other men involved had as much tenure as Mr. Green did at that time?"

A. "They had more tenure in the electronics equipment division."

Q. "What about tenure with respect to the plant itself?"

A. "I don't know. I believe that no one had any more tenure than Green had in the company."

Q. "All right. Then, your best recollection is that he had probably as much tenure as anyone there of those people being laid off?"

A. "That is right."

Q. "As far as the company is concerned; is that correct?"

A. "Right."

Page 43. Is it all right, Mr. Foote, if I just start with the question, did you know that Mr. Green had climbed the Arch? Is it all right to start there?

A. "He told me he had; yes."

Q. "When did he tell you that?"

A. "At our first meeting."

Is that page 44, is that what you have, Mr. Foote?

Mr. Foote: Yes; 44.

Mr. Gilden: Q. "Now, after you had the second [320] meeting with Mr. Green and you told him that he was going to be laid off, that you had investigated the matter, what was the next time you heard about Mr. Green?"

The answer is: "I really don't recall; probably shortly thereafter."

Q. "And what was that, sir?"

A. "He and a group of his associates were picketing and demonstrating before the entrance of Mr. J. S. McDonnell's home."

Q. "And do you know when this took place, sir?"

A. "Sometime in the fall of 1964, because the schools were in operation at that time, so it was after school started. I would say probably September."

Q. "Now, who conveyed this information to you?"

A. "Mr. McDonnell."

Q. "Mr. J. S. McDonnell?"

A. "Mr. J. S. McDonnell."

Question on page 48, Mr. Foote: "Now, you said you reported to Mr. McDonnell on the stall-in. Do you know when that conversation took place?"

A. "I think in the fall of '64. When the [321] stall-in occurred; I don't recall when it occurred. I think probably October or sometime in '64."

Q. "Now, did he call you or you call him?"

A. "I called him."

Page 50:

Q. "Was the stall-in successful?"

A. "Not as successful as Percy would have wanted, I don't believe."

Q. "How successful was it?"

A. "Oh, I would say that probably a few hundred people were delayed up to ten minutes. It would have been terribly successful if the police had not been there; probably would have stopped work for that shift."

Page 57, is that the next one you have?

Mr. Foote: Yes.

Mr. Gilden: "Were you, at that time, advertising for the job classification that Mr. Green had made application for?"

A. "Yes, sir."

Q. "And did you have vacancies at that time?"

A. "Yes, sir."

Q. "You had openings for employment; is that correct?"

A. "Right."

Mr. Foote, can we agree that those questions and [322] answers relate to the prior page when he made application for employment?

Mr. Foote: I didn't understand what you said.

Mr. Gilden: The questions and answers have no relationship, it must be pinpointed when he made application. They relate to his application for employment?

Mr. Foote: Yes. On July 26, 1965, we can so stipulate.

Mr. Gilden: All right. That is all I have here from the deposition.

Mr. Foote: Mr. Gilden, before we go any further in the depositions, I think we have a stipulation that we agreed that you would read these parts of the depositions into evidence and we would not be required to produce Mr. Krone under the subpoena duces tecum. We would have the right to read whatever other parts of the depositions might be necessary to explain these in our part of the case, is that correct?

Mr. Gilden: Well, I don't know whether—I don't know whether that was the stipulation. I think what we have here is that under the subpoena duces tecum the Court is going to make an order on certain records.

Mr. Foote: I understand that.

The Court: Now, while we are talking about the subpoena duces tecum, you have the information which you requested except for the years '64 and '65, is that correct?

[323] Mr. Gilden: I think it is through——

The Court: Through September of '64?

Mr. Gilden: Through September of '64.

The Court: You will supply the additional information from September of '64 up to July of '65?

Mr. Foote: Yes, sir. Your Honor, we have agreed to provide information similar to that provided in Exhibit 33.

Mr. Gilden: 33.

Mr. Foote: Tab No. 30 from the date of the end of that exhibit, which is September 1964, through July of 1965.

The Court: Very well.

Mr. Gilden: On the question of the stipulation with respect to Mr. Krone's testimony, I can't stipulate that, because I am deprived of the right of cross-examination with respect to other matters. I don't think I agreed on that.

Mr. Foote: You remember, Mr. Gilden, I made an objection when you wanted to read the deposition or place the whole deposition in the record. We had a conversation on it. It was my understanding when we agreed to these various parts of the deposition you could read that we would have an opportunity to read into the record any other parts of the deposition which would explain the answers.

Mr. Gilden: For your case, yes.

Mr. Foote: That is correct.

Mr. Gilden: For your case, not in plaintiff's case.

[324] Mr. Foote: No, no, not in plaintiff's case.

Mr. Gilden: OK.

Mr. Foote: So that we can do that without producing Mr. Krone and bringing him in here himself. We can read those parts of his deposition which relate to the sections you just read into the record. That was my understanding of the stipulation.

Mr. Gilden: Let me just confer with my client a second. Your Honor, there is some confusion in my mind at this point.

The Court: What is your trouble?

Mr. Gilden: My problem is this, that I don't have any objection—I think I told Mr. Foote that I would read certain portions of the deposition and he had no objection to that, and that he could read certain portions of the deposition.

The Court: It is my understanding he objected to reading the deposition for the reason the witness is available.

Mr. Gilden: That is correct.

The Court: How you arrived at it between yourselves I wouldn't know.

Mr. Gilden: I understand that.

Mr. Foote: I think under the rules that if a deposition is read into evidence, at that time when it is read, in case it is read into, the other party has a right to require [325] that other answers on the same general subject be read to give a flavor and perspective to the questions. We could stop and do that now, but I haven't had time to go through the deposition. I didn't know this was going to happen because Mr. Krone has been under subpoena. I am just asking to do that in our case.

Mr. Gilden: I have no objection. He can read portions of the deposition in his case, Your Honor.

Mr. Foote: With that stipulation then the subpoena for Mr. Krone is quashed, as I understand it, and is no longer binding on the condition we produce the record that you described.

Mr. Gilden: Right.

Mr. Foote: May we also have a week from the close of this hearing to produce those records for the files. Is that agreeable to you?

Mr. Gilden: It is agreeable with counsel for plaintiff.

Mr. Foote: All right.

Mr. Gilden: Your Honor, I just want to make comment to the Court before I close. I think I am ready to close plaintiff's case except for one comment. Your Honor has stated that there is nothing in the case of U. S. versus Sheet Metal Workers that related to the Arch, and I would like the Court to note page 8 of that opinion, Cause No. 19,316, which states in paragraph E, "Both locals discouraged their members from working on construction jobs on which Negro craftsmen or Negro contractors were employed. As late as December 1965 the Building & Construction Trades Council of St. Louis, AFL-CIO, issued a policy statement that its affiliates would not work on construction projects in St. Louis unless the project was manned entirely by AFL-CIO members. Pursuant to this policy, Local 1 and Local 36, among others, boycotted the Arch project in St. Louis when Negro craftsmen belonging to an independent union were employed." Then they quote from the minutes of Local 36. So the Arch is commented upon in that opinion.

Plaintiff closes, Your Honor.

Mr. Foote: May we have one clarification? My notes indicate that Exhibit 33, tab 36, namely Mr. Connell's re-

port, has been marked and identified but not introduced, is that correct?

Mr. Gilden: Not introduced, that is correct.

Mr. Foote: Your Honor, before we open our case I would make an oral motion that the plaintiff has failed to establish a cause of action and that the claim should be dismissed at this time under Rule 12(b)6 for failure to state a claim on which relief can be granted and for failure of proof.

The Court: Ruling will be reserved.

DEFENDANT'S EVIDENCE

EDWARD SINECKI

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as [327] follows:

Direct Examination, by Mr. Foote

Q. Mr. Sinecki, will you state your name, please, sir? A. Edward Sinecki.

Q. Where do you live, sir? A. 17 Shawnee Drive.

Q. Where is that? A. St. Charles, Missouri.

Q. Where do you work, Mr. Sinecki? A. I work at Conductron.

Q. Is Conductron a subsidiary of McDonnell? A. Conductron is a subsidiary of McDonnell.

Q. Did the work in the division which is now Conductron used to be a part of McDonnell Aircraft Company? A. Yes. It was then known as the E.E.D. Division.

Q. Before you worked at Conductron you worked for McDonnell Aircraft Company? A. Right.

Q. And McDonnell Aircraft Company is now McDonnell-Douglas, is that right? A. Yes.

Q. What was your job when you worked for the E.E.D. with McDonnell-Douglas? A. At that time I was supervisor of Laboratory Services.

[328] Q. From what period to what period? A. I went into that job, I would say, approximately ten to twelve years ago.

Q. What were your responsibilities as supervisor? A. I was in charge of the general engineering laboratories. I had supervisors reporting to me who were in charge of the technician activities. We assigned these technicians to the various projects.

Q. Was a Mr. Robert Godefroid one of the supervisors under you who reported to you? A. Mr. Godefroid was one of the supervisors reporting to me.

Q. Do you know Percy Green? A. I know Percy Green.

Q. Did Mr. Green used to work in the E.E.D.? May we refer to the Electronics Division? A. Mr. Green worked in the E.E.D. Division.

Q. We will call it the E.E.D. from now on. A. Yes.

Q. Did Mr. Green work in the E.E.D.? A. Yes.

Q. That was under your supervision? A. Partially. Prior to being transferred to the laboratories he worked in production aspects which was entirely [329] divorced from my responsibilities.

Q. Did you have a conversation with Mr. Green sometime in approximately May of 1962 concerning his request for a transfer into the E.E.D.? A. I had a conversation with Mr. Green, I will say it was in 1962, concerning his transfer, yes.

Q. Had you had any other previous conversations with Mr. Green about transferring into that department before this one? A. There was a written request for transfer

submitted. At that time there was an availability of more experienced technicians from Emerson. I believe they were being laid off at that time, and we turned down that request.

Q. The conversation that you had in 1962, was that at Mr. Green's request? A. The request came through the Transfer Department but Mr. Green would have had to have instigated the action.

Q. Who was present at this conversation to the best of your recollection? A. Mr. Godefroid, Mr. Green and myself.

Q. What did Mr. Green say and what did you say? A. Mr. Green requested a transfer, at least we discussed the possibilities of a transfer into our department. We discussed the type of work that was available. I explained to him [330] that we were hiring for this one program which was known as the Gemini simulator; that it was what we refer to as a short term type of job, the short term being it is not going to last for about, for year after year. And after that time I would probably have a surplus of technicians. I felt that I owed that to Mr. Green, since he had approximately seven years of seniority with the company. He was in a union operation, and once he trransferred into the lab he would no longer be union. He would be part of the free enterprise personnel, and he in turn—well, during our discussions, we discussed among other things, one was his colored glasses, which has been previously mentioned.

Q. What did you say and what did he say about his glasses? A. I asked the reason why he wore these glasses. And it came up in a discussion about him doing electronic technician work. A lot of the components and the wires are color coded where it is necessary for an individual to be able to differentiate between yellow and orange and red and violet and blue and so forth.

Q. You told this to Mr. Green? A. We discussed it, yes. And I questioned his glasses to what effect they would have on it. He mentioned that they would not have any effect, and that it was necessary that [331] he did wear tinted glasses.

Q. Was there any discussion further about Mr. Green's apparel? A. I did not discuss what he was wearing per se. We discussed what was expected of the technicians regarding the way they dress.

Q. What did you say about what was expected of the technicians concerning dress? A. I mentioned to him that since we are part of a semi-professional organization, engineering, that we have quite a number of visitors from potential customers, be it civilian or military, and that since their evaluation of our operation depends quite a bit as to what our future work will be, we do try to put on a good show. I did not want to or would prefer not to see people coming in in dungarees and that type of dress. We ask that people dress in normal slacks and sport shirts and that type of dress. We did not insist on anyone coming in with a white shirt, or a tie or suit or that kind of thing.

Q. Did you describe specifically what kind of work was available in the department in your first conversation? A. At the time it was explained that since the simulator program, the Gemini simulator, was already in the fabrication stage, that by far the majority of the work we had available [332] was of a fabrication nature. And I am quite sure that Mr. Green was familiar with what we were discussing since at that time he was working on a production operation.

Q. Were you acquainted with Mr. Green before this conversation? A. I knew of him. I may have said "hi" to him a few times. I know he worked out in the production department.

Q. Were you acquainted with the kind of work he was doing there, his assignments, his experience? A. His detailed assignments, no; I knew he worked out there and the general type of work he was doing.

Q. Was there any more to this conversation, the first one in 1962, that you had with Mr. Green? A. There probably was but—I know we met for, I would say at least an hour. As far as what else we discussed, I can't recall right now.

Q. Did Mr. Green subsequently notify you that he had made a decision on whether or not to take the job? A. He notified, I believe it was Mr. Coles who was in charge of transfer at that time that he turned the job down. I know my first contact was with Mr. Coles. He is the one who notified me that Mr. Green had turned the job down.

Q. Did you have any subsequent conversation with Mr. Green about a request for his transfer into E.E.D.? [333] A. Well, we had another meeting where he reactivated his transfer.

Q. When was that, sir? A. I would say this would be just prior to the time he transferred in. He transferred in, I believe, either August or September of '63.

Q. What did you say and what did he say at that meeting? A. I guess we had the same general type of discussion, where the work he had was not expected to last forever; and that once he did come in it would be strictly a matter of his ability versus other technicians' ability.

Q. Are you saying that the conversation was generally like the first discussion and the same points were made and questions asked and so forth? A. To the best of my recollection, yes.

Q. Was Mr. Green subsequently transferred into E.E.D.? A. He was—well, he already was in E.E.D. He transferred

from the production operation to the laboratory operation.

Q. Was the laboratory department 958? A. 958; yes.

Q. And that transfer was in the late summer of 1963, to the best of your recollection, is that right? A. Yes.

[334] Q. Had you had other interviews with other people who were interested in transferring into Department 958? A. Yes. At that time I did interview other people who were requesting transfers as well as new applicants.

Q. I didn't mean specifically at that time, but throughout your period of supervisor over this department? A. Up until about three years ago I was quite extensively involved with new personnel.

Q. Was there anything you told Mr. Green in either of these two interviews you have just described which was different from what you told others in similar interviews? That is about the job description——

Mr. Gilden: I am going to object to the form of the question. We don't know who he talked to. The question is too broad and it gives a roving commission to this witness to say almost anything without any foundation being laid.

The Court: Sustained.

Q. (By Mr. Foote) When you interviewed people who were interested in coming into 958 were there certain items of information that you told them about as a normal course? A. We discussed what the job consisted of that we were hiring them for. We gave them a tour through the facility. We showed them through. I won't say we showed them exactly what they would be doing, but it would be work similar to that. [335] Even when I would go out on various recruiting campaigns I pretty well made a standard practice that a supervisor would go out, this would be going out to various technicians' school up in Chicago and others, where I preferred not to have a personnel man go up and do it. I pretty well insisted that one of our supervisors go.

Q. In these interviews with people who were interested in coming into Department 958, would you discuss in the general course of the interview, was it your practice to do so——

Mr. Gilden: Your Honor, I will object——

Mr. Foote: I haven't finished the question yet, Mr. Gilden; I haven't finished the question I don't believe.

Q. (By Mr. Foote) Was it your practice to discuss dress and the standards that were required of dress in Department 958?

Mr. Gilden: Your Honor, the question is almost hypothetical. It is not directed to anybody. It is establishing custom and usage and there has been no foundation laid for that.

Mr. Foote: I think he——

The Court: Overruled.

Q. (By Mr. Foote) You may answer. A. Will you repeat the question, please?

Mr. Foote: Would you read it back, please.

[336] (Question read by the reporter as follows:)

Q. "Was it your practice to discuss dress and the standards that were required of dress in Department 958?"

A. I would say as we showed them through the lab, it usually came up where we showed them typically this is what a technician does, this is typically what a technician wears. I know there have been cases where we had technicians come in, I guess trying to make a good impression, wearing a white shirt and tie and so forth.

Q. Are there certain standards of dress or were there at this time in the lab? A. There was a standard of dress that we preferred and desired, yes.

Q. Did you publish that? Did you mention it to the employees or say anything about it to them? A. There was no publication. This, when it did come up, came up as a matter of conversation.

Q. That is what I am asking you. A. Yes.

Q. Did you have occasion periodically to speak to employees about dress? A. Oh. Yes, periodically. I can't come up with any details, but I remember where people just didn't comply with [337] what we wanted.

Mr. Gilden: Your Honor, here again his testimony is even a statement of vagueness. We don't know when it occurred.

Mr. Foote: I think the witness is doing his best to recall.

Mr. Gilden: Your Honor, I——

Mr. Foote: The essence of this lawsuit is that Mr. Green was treated differently from everybody else in Department 958. I think it is a relevant and proper question to ask this man who was in charge of this department how he treated everybody else.

Mr. Gilden: Your Honor, he can ask the question how he treated other people. This witness can identify who the other people are so I can cross-examine. And we will have an opportunity of interviewing these other people, if need be, to find out if the same impressions were left with these other people that were left with Mr. Sinecki; we are talking of to whom this was directed and when.

The Court: I am going to overrule the objection then you can ask him that specifically on cross-examination.

The Witness: The question, please? May I have the question, please?

The Reporter: You were answering, "Oh. Yes, periodically. I can't come up with any details, but I remember

[338] where people just didn't comply with what we wanted."

A. (By the witness) Then we discussed it with them; but as far as coming up with any particular name or something, I cannot recall it.

Mr. Gilden: I am going to ask that that be stricken, his testimony with respect to these matters, there is no way we can cross-examine with respect to this. It is too broad, he even says it is vague, and it is not even his best recollection.

The Court: What was his answer?

Mr. Gilden: He said it was all vague.

Mr. Foote: Let's hear his answer, Mr. Gilden.

The Court: Read the answer, Miss Wood.

(Answer read by the reporter as follows:

A. "Oh. Yes, periodically. I can't come up with any details, but I remember where people just didn't comply with what we wanted. Then we discussed it with them; but as far as coming up with any particular name or something, I cannot recall it.")

The Court: Proceed.

Q. (By Mr. Foote) Specifically concerning lady employees, was there a standard of dress which was in existence in the department at the time Mr. Green made application, which was communicated in some fashion to the employees? [339] A. Yes. At that time we had, I would say either three or four what we have called technical assistant personnel. These were not people who had any technical background. They did not act as technicians per se but they worked in some of the labs on a technical recorder or processing and that sort.

Q. These were women? A. These were women.

Q. Were they requested to dress in a certain fashion? A. They were requested not to wear slacks or pedal pushers or whatever you call them.

Q. For the same reasons the rule was in effect for the other people in the department? A. Yes.

Q. Mr. Sinecki, you have been sitting here in the courtroom and you remember Mr. Green's testimony that he was not taken on a tour of the plant when he applied, do you not? A. I do.

Q. Do you, yourself, have any specific recollection that Mr. Green was taken on a tour when he applied? A. It was our standard practice to show everyone through, however——

Mr. Gilden: I am going to object. That isn't the question. The question that was asked was whether or not Mr. Green was taken on a tour.

[340] A. I do not specifically remember.

Mr. Gilden: Your Honor, would you like to rule on the objection?

The Court: Well, he can answer the question.

Q. (By Mr. Foote) The question was concerning Mr. Green. Do you have any specific recollection of Mr. Green? A. I do not have any specific recollection of Mr. Green being shown through the lab.

Q. Was it standard practice? A. Yes, it was.

Mr. Gilden: I am going to object to that, Your Honor. That isn't what we are called upon to decide. The question is what happened to Mr. Green.

Mr. Foote: It seems to me that that is exactly what we are called upon to decide, and that is whether Mr. Green was treated any differently than anybody else. The man

says he doesn't remember. He has a right to testify what the standard practice is though and what it was at the time.

The Court: That objection is overruled, he may answer.

Q. (By Mr. Foote) The question was was it standard practice to take employees who were applying for work in 958 on a tour of the area? A. Yes, it was.

[341] Q. How many employees were in Department 958 at the time that Mr. Green was working there, approximately? At the time when he came in or at the time when he left?

Q. At the time he came in? A. I would say it was in the vicinity of one hundred, eighty to one hundred or so.

Q. Were all these employees what you have referred to as free enterprise personnel? A. Yes.

Q. Were these people subject to layoff without protection of the union contract, in your understanding? A. Yes.

Q. When Mr. Green was transferred to Department 958, what was his job title? A. He was transferred in as a laboratory technician B.

Q. Grade B? A. Grade B.

Q. How many grades of laboratory technician are there or were there in the department at that time? A. We have laboratory technician B; the next higher one is laboratory technician A; the next one higher was the development technician and then a senior development technician.

Q. Were the duties and responsibilities of these four [342] categories of technician specifically delineated or was there an overlap in their duties? A. A lot of that depended on the type of work we had available. If we received jobs that had a large degree of fabrication type of work we would have higher level technicians doing that type of work because that is what we had to do.

Q. Would it ever be—to your recollection was it ever the case that development technicians might be doing fabrication work during the period of time that Mr. Green worked in your department? A. Absolutely, we did have.

Q. Describe specifically the work, the kind of work that Mr. Green did in the department? A. The work he was brought in for was on the Gemini Mission simulator, which to a large degree was at that particular time fabrication work. He was assigned to that program working under, I believe a lead technician, Mr. Holzhauser, who reported to Mr. Godefroid. The work he was assigned to was the, the first job was the assembly of a wire harness to some front panel.

Mr. Gilden: An assembly what?

The Witness: A wire harness; cables, harnessing and that type of work. Periodically after that he was assigned other duties, some of which consisted of testing, some of them [343] consisted of engineering support. At that time engineering support consisted of being assigned to an engineer or a group doing engineering support, consisting of breadboarding and testing and that sort of thing.

Q. (By Mr. Foote) Mr. Sinecki, I will hand you what has been received in evidence as tab No. 14 of Plaintiff's Exhibit No. 33, consisting of a number of documents in all with the name Percy Green upon them. I will ask you if you can identify those documents? A. These are sheets that were turned in on a weekly basis by the individual technicians. On this sheet they delineated the unit they worked on, the type of work that they did, whether it was fabrication, whether it was harness, whether it was engineering support and so forth, and the number of hours per day that they spent on that particular job. These were on a weekly basis.

Q. Would Mr. Godefroid be more familiar with the specific details of the work listed there than you would? A. Yes. These sheets were submitted through him.

Q. Was it the practice in the department for all technicians to submit sheets like this? A. At that time it was the practice that all people on the Gemini simulator submitted these because we were trying to keep track of where the costs went.

[344] Q. Was that the purpose of these records? A. Yes.

Q. Looking at the first page of the various time documents in tab No. 14, what does unit number mean? A. That is probably the serial number of the simulator. We built two simulators.

Q. What does engineering support mean? A. Engineering support was the type of work he was doing.

Q. Would that be helping an engineer? A. That would be doing something above the normal fabrication type.

Q. What does fab mean in the third column there? A. It means fabrication work, where he was building something.

Q. What does the next category, reading from left to right? A. It says harness something. That is where he would be—I don't know this. Anyway, he would be working on various harness assemblies and that sort. The ETE tooling, I believe that stood for engineering test equipment tooling. The next one is EMC. That I don't know. Then there is reliability. That covers, if we assign technicians to some reliability group, coming up with some reliability documentation.

Q. All right. Looking at the first page in the document [345] behind tab 14 here am I correct in stating that the checkmarks indicate on the face of the document that twelve hours was spent during this week on engineering support? A. I believe you're on the wrong line.

Q. I'm sorry. Let me ask you this question. There are two checkmarks under the column Engineering Support. What do they indicate? A. They indicate that on Wednesday he spent eight hours doing engineering support and on Thursday he spent eight hours doing engineering support.

Q. Turning to the second page, what do the checkmarks indicate? A. Those checkmarks there indicate that—this is a little bit confusing. This is someone else's notation here. This red.

Q. There is a red box with an arrow, you don't know what that means? A. I can interpret the thing. Those checkmarks are under engineering support, which showed he spent all except ten hours of that week doing engineering support.

Q. Now the third page, there is one checkmark shown. What does that indicate to you? A. It shows that on Monday he did engineering support for five and a half hours, then there is nothing shown for the [346] rest of the week. But it is the same charge number.

Q. The next page is dated 1 December '63, what do the checkmarks indicate to you? A. The checkmarks indicate he spent the entire week, a total of thirty-nine hours, doing engineering support work.

Q. The next page dated 12-8-63, there is one checkmark. What does that indicate to you? A. It indicates he spent the entire week doing engineering support work.

Q. The next page dated 12-15-63 has one checkmark, what does that indicate to you? A. OK. That page there indicates he spent ten hours on Monday doing engineering support and spent the remainder of the week ringing out, which is testing various cards and chassis.

Q. One day engineering support and the rest of the week testing? A. It says here card test and chassis ring-out, yes.

Q. You are reading from the left-hand column of the page dated 12-15-63, is that correct? A. I am reading from the left column, yes.

Q. It says card test and chassis—— A. Ring-out.

Q. Ring-out. Is that testing? A. Card testing, what that amounted to was the printed [347] circuit cards which is a sub-assembly composed of various discreet electronic components that were built up by various people, probably in this case production people. He tested them, and we did have some testers which were, I believe lab built testers. We plugged in a card put switches in various positions, took various meter readings and so forth. The chassis ring-out consisted of taking these continuity tests that Mr. Green mentioned previously.

Q. On the next page, dated 12-22-63, the checkmark is under Engineering Support. What does the page indicate to you? A. Card check-out. He spent the entire week testing these printed circuit cards.

Q. Under Engineering Support? A. Under Engineering support.

Q. The next page, 12-29-63, what do the checkmarks indicate to you? A. On that date he spent eight hours on Tuesday.

Q. Doing what? A. Doing engineering support. He spent eight hours on Thursday doing engineering support, and he spent eight hours both Friday and Saturday doing fabrication work.

Q. The next page, 1-5-63, what do the checkmarks indicate? A. The checkmarks indicate that Monday, Tuesday, Thursday, [348] Friday and Saturday for a total of forty hours he spent doing engineering support and—wait. This is one—no, he spent forty-seven point five hours doing—this is that combined one, we ran short of forms, he spent a total of forty-seven point five hours that week.

Q. The next one dated——

Mr. Gilden: (Interrupting) Mr. Foote, I didn't get what he was doing, what kind of work he was doing.

The Witness: Engineering support.

Q. (By Mr. Foote) The entire week? A. Forty-seven point five hours.

Q. 12 January 64, the page marked like that, what do the checkmarks indicate? A. That he spent fifty-four hours that week doing engineering support.

Q. The page dated 119-64, what do those checkmarks indicate? A. This one is difficult to determine which input was Mr. Green's and which was Mr. Borchardt's. This list here covered two people, because we ran out, one period we ran out of these forms, so it was necessary to double up.

Q. However—— A. One technician on this page spent forty-five hours doing engineering support and another technician spent fifty-four [349] hours.

Q. Doing what? A. Engineering support.

Q. The next page, 26 January 64, what do the checkmarks indicate? A. The checkmarks here indicate he spent—he was out sick, Monday, Tuesday, Wednesday, Thursday and Friday, he spent thirty-two hours doing engineering support, and on Saturday he worked overtime doing fabrication work.

Q. What does the next page, dated 2-2-64, indicate? A. This one indicates he spent thirty-two hours that week doing engineering support. This last, he was out eight hours, I don't know what that is I can't read it. It is not legible.

Q. And the sheet dated 9 Feb. 64, what does that indicate? A. It indicates he spent forty hours doing engineering support.

Q. Mr. Sinecki, is there a difference, or was there a difference at the time Mr. Green was in the department between engineering support work as shown on these time cards and basic fabrication? A. At that time, yes, basic fabrication was where he was engaged in building a unit that would eventually become part of a simulator. Engineering support, it could be a multitude of [350] other types of assignment.

Q. Not basic fabrication? A. Not basic fabrication.

Q. Outline, if you will, the other assignments that might be entailed in engineering support? A. It could be working with someone, coming up with a——

Q. (Interrupting) Who would that be, the someone? A. Either reporting to a technician, a supervisor in the technician hierarchy. We had lead technicians. I can't recall their names. Either those type of people or Mr. Holzbauer, Mr. Godefroid, or various types of engineers. It can be compiling various documentation. It could be building test sets. It is difficult to define exactly what it would consist of.

Q. Was the kind of work that Mr. Green was doing while he was in Department 958 different substantially from the kind of work assigned to other lab technicians B? A. No, I don't believe it was.

Q. Did other lab technician B's do fabrication work? A. Yes.

Q. Did other lab technicians B's do engineering work? A. They were also assigned to that type of work periodically depending upon what was available and what was necessary.

Q. Was his work any different as you look back now in light of all that has happened, his work assignments any [351] different from the other lab B technicians in the department? A. Not that I am aware of.

Q. Were there certain union employees who were working in the same general area? A. Yes. This job was, I would say, contractually size, certain portions of it should have been done by union personnel, since it was an end product and deliverable to a customer.

Q. Did the union personnel do some fabrication work? A. They also did assembly fabrication type of work, yes.

Q. What was the difference, if any, between assembly and fabrication work the union people did as opposed to that done by the technicians? A. Will you repeat that, please?

Q. What was the difference, if any, between the work, the assignment done by the union people in 958 and that done by the technicians? A. I would say the major difference was the type of documentation and the assurance that the information available was good information. Normally when a man is working out in production he has release prints, the design has been pretty well finalized, through check and so forth. He has documentation, be it a training, not a training guide, some assembly guide or what have you.

Q. This is a union man, now? [352] A. A union man, yes; where it tells him to do particular type work.

Q. Tells him exactly what to do? A. Right. Steps, wherein the engineering laboratory, a lot of that information is not what we would call released information, firm prints and so forth, where the guy—there are times when he has nothing more than some scratch sheet from an engineer, a schematic and so forth, and he determines his wire routing and so forth. He just doesn't connect the wire from point A to point B. He has savvy enough that he knows how to route it through various paths and so forth.

Q. In other words, technicians are required to exercise more imagination and ingenuity? A. Yes.

Q. As opposed to the union people? A. Yes.

Q. Of the work that Mr. Green did, would you have an opinion on how much of it was menial work? A. I think it was much less than what Mr. Green mentioned.

Q. You heard his testimony today, what would your testimony be on your opinion of how much was menial? A. The amount of menial work?

Q. Yes. A. The definition of menial work would be different for [353] everyone. I believe it is a state of mind. What he would consider menial someone else may consider as challenging. Now as far as coming up with a definite amount, it would be difficult.

Q. Let me ask you this question. Was the amount of work of a menial kind that Mr. Green did according to your definition, any less or any more than the amount of menial work that other lab techicians did? A. It was not.

Mr. Gilden: I am going to object to the form of the question. You are asking for an opinion on the part of this witness as to the menial work that was done. And his answer, I will buy the first one when he says that to someone a job might be challenging and to someone it might be menial. I think what we have to characterize here is a man of Mr. Green's experience and his training. This should be the foundation of the question.

Mr. Foote: That might be what you think we have to characterize, but my question is not phrased such. My question is the other lab technicians who were in the department assigned at the same time Mr. Green was and under the same category, that is lab technician B, that is my question.

Mr. Gilden: I am going to object to it unless there is a characterization. As this witness has stated, there will be jobs that are challenging to someone who has never had the [354] experience and the training. To someone

who has had the experience and training the jobs may very well be menial.

The Court: Well, in view of the fact he has not defined menial and I don't know what he would be talking about, and you have asked him what is menial and what isn't, I am going to sustain the objection. That is the reason for it.

Q. (By Mr. Foote) Of the work that was being done during this period of time that Mr. Green was in Department 958, what would be your definition of menial? A. My definition of menial work would be working at some basic job, be it wiring connectors, cables, harnesses, where you are not called upon to do any thinking. It is strictly a matter of taking the red part and putting it in a black hole time after time after time, repetitive type of a job.

Q. With that definition, would you say that the amount of work that Mr. Green did of a menial nature was any more or any less than the amount of work that other grade B technicians did during the time he was in the department? A. I was not aware that it would be any more or any less.

Q. What was the status of the work being done by Department 958 in the spring of 1964? A. The status of the work being done at that time indicated that we were reaching a peak and we would soon have [355] surplus personnel.

Q. Why was that? Why were you reaching a peak? A. Because we hired people for—I would say we hired a large number of technicians for this Gemini simulator, and the job was phasing out. I believe at one time we had, I don't know, fifty, sixty, seventy technicians on that one program.

Q. I will hand you what has been marked as tab No. 19 of Plaintiff's Exhibit 33, received in evidence, and ask if you can identify that? A. Yes. This is a graphical rep-

resentation of the number of personnel or number of technicians that we had in Department 958 at that particular time. It indicates various levels from January of '61 through July of '64, or August.

Q. August of '64? A. August of '64.

Q. What were the peak months on that graph? A. The peak month on this, there was only one peak month, that was September of '63.

Q. From September of '63 to August of '64, does the graph show a decline in the number of personnel? A. It shows a drastic decline from a peak of one hundred fifty-seven or so down to about ninety.

Q. Was Mr. Green hired at approximately the peak, that is accepted in the department as approximately the peak? [356] A. Yes.

Q. In connection with this falling off of work in the department, were any personnel decisions made? A. What do you mean by personnel decisions?

Q. Were any decisions made concerning the number or placement of personnel in Department 958? A. Yes. At one time I was notified, I don't know whether it was from the Planning Department or whether it was Personnel or Project for People or who, but I was told it was necessary to cut back with twenty-four personnel, twenty-four technicians.

Q. When you say cut back, describe specifically what you mean? A. When I mention cut-back I mean reduce in number.

Q. During the spring of 1964, was anybody laid off from Department 958? A. Yes.

Q. Was Mr. Green among them? A. No.

Q. What did you subsequently do after you had been instructed by Personnel Department about the surplus employees? A. What has been referred to as the totem pole

was submitted or rather compiled I would say, in about April of '64.

Q. Was this the first totem pole that had ever been compiled in the department? [357] A. No, that is standard policy at McDonnell.

Q. What was the purpose of the totem pole? A. The purpose of the totem pole is to compile an evaluation of personnel in order to determine if they do and to an extent the amount of raise they will be granted.

Q. How often while you were in the department or supervising it were totem poles made? A. On the hourly personnel they were ran on a semi-annual basis.

Q. When, annually? A. They were effective January and November of the year. However, the factual data was acquired a month or two months prior to that.

Q. The totem pole, then, was a ranking of employees, is that correct? A. It was a ranking of employees, yes.

Q. How was the ranking determined? A. Ranking of our technicians was the one I was familiar with.

Q. I am referring specifically to the ranking of technicians. A. OK. The two lower levels of supervision which in this case was Mr. Godefroid and the supervisory technicians reporting to him, they ranked these technicians in their pay [358] grade according to their abilities, potential, performance, cooperation and so forth. These classifications were then combined into one over-all group covering all of the technicians.

Q. Then what was done? A. Then they submitted this to me for my concurrence, recommendation, approval, disapproval, what-have-you. I made my comments. Once this was done various representatives from the engineering group, engineers that were, let's say had some knowledge of the technicians at that particular time, they had technicians working for them and so forth, we did not call in all engineers but just representatives from various groups

in the department. They in turn made their comments, their recommendations, their suggestions, they voiced their approval, disapproval and so forth.

Q. Throughout this process was the totem pole revised, depending on what the recommendations were? A. Yes.

Q. Then finally was there a ranking made of the technicians of the department? A. There was a final ranking made. These people were listed vertically. This is a graph type of device. These people were listed vertically, the amount of money or the pay that they were getting was spotted on the horizontal, an average was drawn through these various points, an average curve, [359] a certain amount of money was then allocated to us from the Personnel Department. We did not have the option of assigning as much as we wanted to to whomever we wished. They gave us a blanket amount, so many cents, dollars, depending on what was available. We then went and attempted to give raises, well depending on where they fit on the average curve we drew. The ones that fell to the left of the curve, which indicated that they were maybe a little underpaid compared to the others, were granted raises which brought them over to the curve. If there was still money available, we would move the curve out a few more cents, grant some more raises and so forth.

Q. Am I clear from your description that a graph made of this totem pole ranking had on the vertical axis the names of the employees? A. Yes.

Q. And on the horizontal axis, money? A. Money.

Q. And that for each employee the coordinates of his name and the money were plotted? A. Yes.

Q. And that an average curve following these coordinates was made? A. Yes.

Q. And that if a specific individual employee had his [360] coordinates to the left of the curve, that is below the average, this would be your indication to bring him up to

the average? A. If there was sufficient money available. If we had to spread the money out amongst all of the ones who fell to the left, we couldn't say that man is fifty cents underpaid and give him the blanket fifty cents, we couldn't do that.

Q. How long had this totem pole practice been in existence? A. It was in existence——

Q. (Continuing) ——that you know of? A. I started at MAC in 1956.

Q. Was it in existence then? A. It was in existence then, yes. At least the first time I was exposed to it, a year or two later, it was.

The Court: How much longer will the direct examination of this witness be?

Mr. Foote: I don't believe very much longer, Your Honor. Let me see. I would say another ten minutes.

The Court: How long will the cross be?

Mr. Gilden: I think the cross might take some time, Your Honor.

The Court: When does he have to go into the hospital?

Mr. Foote: When do you have to go in the hospital?

The Witness: Tomorrow morning, check in about 11:00 [361] o'clock.

Mr. Foote: I think I can finish the direct in about ten minutes.

The Court: Well, since you both have personal problems tomorrow afternoon, why don't we start in the morning at 9:00 o'clock and finish it. We can bring him back at 9:00 o'clock.

The Witness: I live out in St. Charles, Your Honor.

The Court: Can you get in at 9:00 o'clock?

The Witness: I can make it in at 9:00 but what time am I going to be released?

The Court: About 10:00. That will let you go to the hospital by 11:00.

Mr. Foote: Could we perhaps finish the direct this afternoon so he can get ready on the cross-examination? I know I will be finished in a short ten minutes.

The Court: All right.

Q. (By Mr. Foote) Mr. Sinecki, I will show you what has been marked Defendant's Exhibit B for identification, can you identify that? A. This is a listing of the technicians that were on this totem pole according to how they were listed.

Q. Where did that listing come from? A. I compiled this from the totem pole that was submitted [382] to Personnel. They eventually get the final copy. This came out of my own personal records.

Q. The ranking of men on that is taken directly from the totem pole that was made up in the spring of 1964? A. To the best of my recollection, yes.

Q. Is that the totem pole that was used in the determination concerning the men who were to be surplused? A. It was used mainly because of providing a comprehensive listing of the people.

Q. But that is the one? A. That is the one, yes.

Q. Can you identify from that totem pole, from what you have in your hand, Defendant's Exhibit B, which men were laid off? A. Yes, I have them marked.

Q. Read their names, please? A. Havermann, Green, McGavern, Swift, Babcock, Silvester, Tate, Marino, Remlinger, that's R-e-m-l-i-n-g-e-r.

Q. Were any of the men laid off technician A's? A. Yes.

Q. Whom? Haverman.

Q. Were any of the men who were placed originally on the surplus list technician A's? [363] A. I don't know. I couldn't answer that either yes or no. I have lines drawn through their names but I couldn't be sure what way they were on the surplus list.

Q. Was Mr. Gaffney on the surplus list, do you remember that? A. I would say according——

Q. Just of your own recollection? If you don't know, that's fine. A. I couldn't be specific and say yes.

Q. Who would be more familiar with the people who were put on the surplus list than you, one of your supervisors? A. Possibly Mr. Godefroid.

Q. All right. Now in determining who was put on the surplus list, what factors were considered? Will you describe the factors that went into the making of the totem pole? What factors did you consider when you made up the list of who would be on the surplus? A. One of the factors was job assignment, depending on the job that he was on. Some technicians were assigned, I would say had already been assigned to jobs for many months previous to that time, where it was not in the best interest of the company that we change personnel on that job at that particular time. There were other technicians who were out of town on field assignments that were not put on that list. There [364] was one or two cases where technicians had specific and specialized training under NASA where they were qualified and authorized to work on spacecraft programs. NASA at that time was pretty particular. People had to be trained and tested to work on those programs. And supervisory judgment, as far as people exhibiting potential and so on and so forth.

Q. These are all factors in addition to the totem pole rating, is that correct? A. Yes. The totem pole was not used as a one hundred per cent guide per se. It was strictly or rather—well, it was used as a guide, that is about it.

Q. After these men were notified that they were to be laid off, did you have any conversation with Mr. Green about the layoff? A. Mr. Green, to the best of my recollection, was notified—the group, the individuals were notified as a group. And after this notification I believe he spoke to Mr. Godefroid and requested a meeting between the three of us.

Q. Did such a meeting take place? A. It took place.

Q. With the three of you? A. Yes.

Q. What did he say and what did you say? A. Well, we covered—First of all, he mentioned, he [365] gave us reasons why he did not take that test.

Q. What did he say about taking the test? A. He refused to take it but I can't recall his reasons why.

Q. He told you he refused to take the test? A. Yes.

Q. What was the test for, do you know? A. The test was being given by the Personnel Department in order to determine which technicians were qualified to be transferred into some grades they had open. I think it was the mechanical electric electronic which was a union job.

Q. These men who were declared on the surplus list, did you send their names to the Personnel Department? Was the Personnel Department notified who they were? A. They would have had to have been notified, yes. But I can't recall whether it was directed through me or through my boss.

Q. Do you know if an effort was made by the Personnel Department to find locations elsewhere in the company for these men? A. Yes. The Personnel Department canvassed many departments. About individuals I imagine they——

Mr. Gilden: Your Honor, I am going to object because he said the Personnel Department did this, unless he personally [366] knows——

Q. (By Mr. Foote) Just to your personal knowledge. A. To my personal knowledge, the Personnel Department did.

Mr. Foote: One moment, please.

The Court: What hospital are you going into?

The Witness: St. Joseph's at St. Charles.

The Court: In St. Charles.

The Witness: Yes.

Mr. Foote: One or two last questions, if I may.

Q. (By Mr. Foote) During your acquaintance with Mr. Green while he was working under your supervision, did it ever come to your attention, except from him, that Mr. Green was discriminated against because of his race or civil rights activities? A. It never did.

Q. Sir? A. It never came to my attention.

Q. To the best of our knowledge, looking back on these events in light of the various charges that have been made, this lawsuit and your recollection, was Mr. Green treated any differently from any other employee technician B in your unit in regard to job assignments, promotions, ranking on the totem pole, or any other consideration to your knowledge? A. To my knowledge——

[367] Mr. Gilden: Just one moment, I am going to object to that, Your Honor, on the ground that is a conclusion for this Court to make and not for this witness to decide.

Mr. Foote: Your Honor, I would say that this was a conclusion that Mr. Green has testified to at some considerable length. This is a man who represented the company whose decision is at issue in this case and I think it is a perfectly proper question.

The Court: Overruled.

Q. (By Mr. Foote) You may answer. A. To my knowledge he was never discriminated against by anybody, either me or the people under me.

Mr. Foote: No further questions.

The Court: Gentlemen, in view of the fact that this witness has to enter a hospital in St. Charles, we will take a short recess then we will finish his cross-examination tonight.

(Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Cross-Examination, by Mr. Gilden

Q. Mr. Sinecki, you have already testified, have you not, you don't know whether Mr. Green received a tour or not, is that correct? A. That is correct.

[368] Q. Now, at that particular time was there also a training period that men would receive in various departments? A. When we hire new employees the first few days we spend indoctrinating them as to how things are done.

Q. In Mr. Green's case did he receive a training period when he went into the lab technician area? A. I don't believe he did.

Q. That by number, I believe, is Department 958, is that correct? A. Yes.

Q. Is that correct? A. That is correct.

Q. Why didn't you give him a training period? A. Since Mr. Green was already employed at McDonnell doing work similar to what he was transferred in to do on this simulator, it just didn't seem it was required.

Q. Do you know how much experience he had had in this kind of work prior to the time he was in Department

958? A. I know he had some experience, yes. I don't know the details.

Q. Would you say it was five years or better? A. I know he had five years or so with the company, yes.

Q. That same type of experience? A. I do not know whether it was all that same type of [369] experience.

Q. But that was a decision you made when he moved into the department? A. I don't know whether that decision was mine.

Q. Were you supervisor of that particular department? A. There were two levels of supervision under me.

Q. All right. But you were in over-all charge of that department, were you not, sir? A. That was not a department I was over.

Q. Of that section? A. Of that section, yes.

Q. All right. A. I don't think the question came up as to whether or not he should be receiving any training.

Q. But he did not receive any, is that correct? A. To my recollection he did not.

Q. Were there any other black people in the lab technician category A or B in the year 1964? A. I had other black people working in the lab, yes.

Q. Were they lab technicians A or B? A. They were doing technician work. They were supplied by an outside company. We did not have the category whether they were A or B. They were strictly technicians.

Q. Were they employed by McDonnell Aircraft Corporation? [370] A. They were not employed by McDonnell Aircraft Corporation.

Q. All right. I am asking how many people employed by McDonnell Aircraft Corporation were black in the year 1964 as lab technicians A or B? A. In my group there was only one.

Q. Who was that? A. Mr. Green.

Q. Did you submit some reports of your dealings with Mr. Green to corporate executives? A. Yes.

Q. When did you start submitting your reports to corporate executives with respect to Mr. Green's layoff? A. I don't know the date but it was——

Q. What? A. I don't know the exact date.

Q. Was it after the layoff? A. It was after the initial notification, to the best of my memory, yes.

Q. Now, can you tell me why you submitted these reports? A. The first report was at the request, I believe, of Mr. Windsor, asking that I bring them up to date as far as what happened.

Q. Was it with respect to Mr. Green only? [371] A. I would say yes.

Q. Were there any other reports submitted for any other employees that were laid off at that time? A. I submitted reports mentioning other technicians, yes.

Q. Well, this has already been introduced into evidence as Exhibit 24. I will ask you if this is the report to Mr. Windsor dated August 15th, 1964?

Mr. Foote: Mr. Gilden, is that Exhibit 24?

Mr. Gilden: Did I say Exhibit 24? I meant to say Exhibit 33, at tab 24.

A. Yes, this is the historical one.

Q. All right. Did you submit any other documentation to Mr. Windsor or any other official with respect to any other employee in the depth, incorporating background, report of meeting, and other information about the employee to the extent that you did for Mr. Green? A. No.

Q. What was the reason, Mr. Sinecki? A. I was never requested to.

Q. You never were told why you submitted a report in depth? A. I believe the reason was just to—well, ac-

tually, no. I cannot give you a specific reason why outside of I was requested to keep McDonnell Personnel informed.

[372] Q. Well, you had never been told that there were —that there was a possibility of a charge of racial discrimination against McDonnell Aircraft Corporation? A. Mr. Green told me that, yes.

Q. All right. But no one in corporate, in management, told you that there was a charge, a possible charge of racial discrimination by Mr. Green? A. It probably came up in discussions; however, I can't recall anyone specifically telling me.

Q. You didn't think this was unusual to submit a report of five pages with respect to an employee being laid off? A. Of course it is unusual. We laid others off that I haven't submitted any report on.

Q. That's right. Did you submit any more reports after August 15th, 1964? A. I kept all our dealings documented, yes. I don't know to what extent——

Q. (Interrupting) Did you have any meetings with Mr. Windsor prior to the time you submitted these reports? A. I met with Personnel periodically. I can't say they were prior to or subsequent to these reports.

Q. Did you discuss with Mr. Windsor the charges of racial discrimination against McDonnell Aircraft by Mr. Green? A. Yes. I kept them fully informed.

[373] Q. And it was during this period of August 15th, 1964, through August 27th, 1964? A. I don't know the exact date, but in that approximate period, yes.

Q. All right. Now how many black men were laid off in that department? A. Only one.

Q. Who was that? A. Mr. Green.

Q. Who was—Of all the employees who had the most seniority that was laid off? A. What type of seniority?

Q. Length of service? A. With the company or in the department?

Q. With the company? A. Mr. Green as far as I know.

Q. Were you acquainted with the testing procedures? A. What testing procedures?

Q. The test that was to be submitted to the men who were laid off to see whether they could be reassigned? A. No.

Q. But you do know that Mr. Green refused the test? A. Yes.

Q. Were you in the decision making body that decided where [374] people would be relocated? A. No.

Q. Were you informed when men were relocated? A. Yes. It was through our supervision that the man was informed.

Q. Did you know that Mr. Green had climbed the Arch?

Mr. Foote: When was that, Mr. Gilden? When?

Q. (By Mr. Gilden) Did you—I will first ask——

The Witness: It was common knowledge, yes.

Q. (By Mr. Gilden) When did you first acquire this information? A. I have no dea.

Q. Was it shortly after the occurrence? A. I have no idea, believe me.

Q. Do you know when the decision was made for layoffs for the group that Mr. Green was involved in? A. Exactly the date, no. It was, I would say, mid-1964 or so.

Q. Could that have been in mid-July 1964? A. It is possible.

Q. And somewhere around July 15th, 1964? A. I could not tell you.

Q. Who told you that there was going to be a layoff? A. I cannot recall whether it came from Planning Per-

sonnel [375] or whether it came from—from the Planning Department or from the Personnel Department or whether it came from my boss.

Q. Do you have any notes or memoranda which would reflect when you first received the information that there was going to be a layoff of the group Mr. Green was involved in? A. I believe in my report I mentioned something to the extent that I was notified.

Q. I believe you stated, that you and Mr. Godefroid were the people who made the totem pole up, is that correct? A. No.

Q. Who did? A. The totem pole was made up by Mr. Godefroid and the, let's say the original version of the totem pole, the initial version, was made up by Mr. Godefroid and the supervsory personnel reporting to him.

Q. The judgment on layoff on the totem pole, was that made by both you and Mr. Godefroid? A. I would say we were involved. I don't know whether we made all the decisions or not.

Q. Did you make the decision for the layoff of Mr. Percy Green? A. I don't know whether it was—I would say the list was compiled in our area, yes. We were not dictated to by anyone as to who is to be on that list.

[376] Q. I didn't ask that question. I asked whether or not you and Mr. Godefroid made the decision that Percy Green was to be laid off? A. No, we did not.

Q. Who made that decision? A. I do not know.

Q. Now, Mr. Sinecki, you testified back in 1962 you talked to Mr. Green and you told him that you advised him against moving into this department, the laboratory, is that correct? A. I don't know whether I advised him of that or whether Mr. Godefroid advised him of it. I know the discussion came up that the work we were hiring people for in a lot of cases was of a less technical

nature than what he was currently doing out in his production job.

Q. Do you recall whether you made the comments to Mr. Green that he shouldn't transfer or whether that was Mr. Godefroid who made them? A. I cannot recall.

Q. In any event, you would have known about it, is that correct? A. That it was made?

Q. Yes. That these comments were made to Mr. Green? A. Will you rephrase that again?

[377] Q. What I want to know is, you said you are not sure whether you talked to Mr. Green about the transfer or whether Mr. Godefroid did, and tried to dissuade him from making the transfer? A. We both were there, but I don't know exactly which——

Q. (Interrupting) All right, but you were present at the time of the conversation? A. I was present at the meeting, yes.

Q. OK. That is what I wanted to find out. Now the department or the section that Mr. Green was in prior to 958 was known as Department 966? A. I do not know. He was in a production department.

Q. All right. Do you know what kind of work he was performing in this production department? A. Generally it was assembly work and testing. I don't know the specific program he was assigned to outside of the one program which was the nose of the steering amplifier.

Q. Now when he moved into Department 958 was that considered a promotion from a prior department? A. Usually people in the union did consider it a promotion.

Q. Did you consider it a promotion? A. Regarding what, potential?

Q. A promotion? [378] A. It was a promotion regarding his potential for further advancement and so forth. Union personnel advance up to a particular point and they can go no further.

Q. Did McDonnell Aircraft consider it a promotion to your knowledge? A. As far as promotion into the technician rank or a transfer into the technician rank is considered a promotion, yes.

Q. All right. So then actually it was a better job than he had before? A. Not necessarily so. Because of a lot of the work we were doing was below the level of that being done in production.

Q. You mean—well, you tell me why it was considered a promotion then? A. Because of the potential for further advancement; in production which utilizes mainly union personnel, they can advance up to a particular point and a particular grade and at sometime in the future they are topped out. The only further increases they get is when they get a new union contract.

Q. You did effectively dissuade Mr. Green from making the transfer to Department 958, did you not? A. I did not.

Q. You talked to him about not doing it, right? A. We laid the facts down and the decision was his.

Q. But you did tell him not to do it and based upon that—— [379] A. (Interrupting) I can't recall me telling him don't transfer in.

Q. You didn't tell him that at all? A. I do not recall telling him that.

Q. Did Mr. Godefroid tell him not to do it? A. I cannot recall Mr. Godefroid telling him that.

Q. You mean neither of you recommended to him that he shouldn't transfer? A. I don't recall whether we have or we have not.

Q. You just don't know, then, is that it? A. I cannot recall. We pointed out the advantages and disadvantages; we probably gave him our opinions that the work he would be doing would be of a lesser nature, yes.

Q. Now do you know an employee by the name of Lowe? A. No.

Q. Do you know whether a person by the name of Lowe actually made a transfer after you tried to—after you gave Mr. Green the facts about moving into this department? A. Whether he tried to make a transfer?

Q. Yes. A. I was told that he tried.

Q. What happened then? A. He turned the transfer down, he changed his mind on it.

[380] Q. Did you request him to make the transfer? A. I did not talk to him.

Q. The company never requested that he make the transfer? A. Pardon?

Q. Did the company ever request that he make the transfer? A. Into the——

Q. Into Department 958, to the lab technician section. A. I don't think the company ever requests these guys to transfer. They initiate the transfer request.

Q. Did you ever know a fellow by the name of Jeffress who was in the—— A. I know Leo Jeffress.

Q. All right. Did you try to get him to move over to Department 958? A. I did not try to get him to move over. Any transfer was initiated by him. He was transferred into the group, yes.

Q. Did you have a conversation with him prior to the time the transfer was made? A. I probably did.

Q. Well, I asked whether you did? A. I do not recall specifically. We have hundreds of technicians coming through that lab.

Q. To the best of your recollection did you or did you not? [381] A. To the best of my recollection I probably did, yes.

Q. What did you say to him? A. I cannot recall, but it would have been along the standard discussion.

Q. When you say the standard discussion, what do you mean by that? A. Showing him the type of work we are doing, calling to his attention that he is going to give up his union seniority and he would not have the union acting in his favor, he would not be governed by union rules and regulations; that his future in the department, be it promotion, layoff, or what have you, would be based mainly on his ability as compared to the ability of other people.

Q. Now, Mr. Sinecki, at one time when Mr. Green requested a transfer, did you turn him down? A. The initial request I did not talk to Mr. Green at that time. It was strictly a forwarding of his transfer request and I mentioned prior to this that at that time we were early in the program, we needed a higher level of development type technicians and at that time Emerson, I believe it was Emerson, Emerson was having a cut-back.

Q. So you got some people from Emerson Electric to come over there? A. I did not get people from Emerson Electric to come [382] over, I got people, to the best of my recollection, and they were applying for a job.

Q. They had come from Emerson Electric, isn't that correct? A. I would not vouch for that, that that is where they came from.

Q. Some of them did? A. Most likely, yes.

Q. You considered them to have higher qualifications than Mr. Green at that time? A. Yes. If I made that decision, that is true.

Q. Now what was Mr. Green's appearance in the year 1962? I say appearance, his dress, how would you characterize it? Did he have a beard? A. I cannot recall his dress. I know he wore his tinted glasses.

Q. Did he have a beard? A. I don't know. During that time he grew his beard. I couldn't say yes or no whether he had it the first time.

Q. How would he—Did he dress in dungarees or did he wear slacks, or how did he dress? A. I cannot recall.

Q. You remember having a conversation about dress, you testified to that. [383] A. I have conversations with a large number of technicians.

Q. You have testified on direct examination about Mr. Green's dress. A. I did not testify as to his dress. I testified as to what is expected of technicians coming into the department.

Q. Then you never commented on Mr. Green's dress to him, is that your testimony? A. I cannot recall whether I have or have not. It could have come up in a conversation.

Q. To your knowledge did Mr. Green's dress ever interfere with the performance of his duties in the Production Section? A. Not to my knowledge.

Q. To your knowledge did the way he dressed interfere with his duties in the performance of his duties in the lab section? A. Definitely not.

Q. You have testified with respect to Plaintiff's Exhibit 33, tab 14, have you not, Mr. Sinecki? A. I have.

Q. Now will you hold that a second (handing document to the witness)? Do you know how many weeks or months Mr. Green served in the lab technician section? A. I believe it was about eleven months.

[384] Q. Can you tell me how many weeks the papers that you have there cover? A. What does it mention, fourteen or so? Do you want me to count them?

Q. Yes. A. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen.

Q. All right. So that is fourteen weeks and he worked approximately some forty-four weeks that section based upon eleven months, is that correct? A. Yes.

Q. So therefore there are thirty weeks not incorporated in the documentation, is that correct? A. Yes.

Q. In front of you? A. Yes.

Q. Now would you know what he did during the other thirty weeks? A. Yes. What he was doing there, basically, was there other than—I say basically, it would be the harness type of work and so forth. We have complete files of every technician for every week. Since we had a large number of technicians, we are constantly cleaning out files. Now we had these complete files when the discharge came up. I imagine for the sake [385] of just brevity the only ones that were retained were the ones that showed he spent time doing work other than the fabrication type of work.

Q. Who made the selection for what was kept and what wasn't kept? A. Probably either me or Mr. Godefroid.

Q. All right. So thirty weeks were thrown away, then? A. Other technicians, their complete year's file is thrown away.

Q. I just asked about Mr. Green's? A. Yes.

Q. Thirty weeks are gone? A. They were thrown out when the files were cleaned.

Q. All right. Now I think you stated that generally his work was fabrication and engineering support? A. Fabrication, engineering support and testing.

Q. And testing? Those are basically the three areas in which he was performing duties? A. That is true.

Q. Would you say that these three duties were commensurate with the work he was performing when he was in the department prior to the time he entered this department?

Mr. Foote: I object to the form of the question. I am trying to figure out how commensurate hangs together with the [386] rest of it.

Mr. Gilden: Well, I will rephrase the question.

Q. (By Mr. Gilden) Do you know what kind of work he was performing prior to the time he entered this department, the lab technician section? A. He wasn't doing laboratory work before he moved into the department.

Q. I understand that. What kind of work was he doing? A. He was part of a production group. They per se do fabrication, assembling and testing. He was engaged in that. The only program that I know he was assigned to, or, at least two programs, one was testing of the Titan program which Mr. Green did not recall this morning, and the other one was the nose wheel steering amplifier.

Q. All right. You heard him testify, did you not, about the sort of a system, I don't have the technical or electrical competence in terms of description. He said it was sort of like a television set type. Did you hear that? Is that what he said? A. He compared it to a television set. I know of no unit that fits that description.

Mr. Gilden: Excuse me a second. (Mr. Gilden confers with his client.)

Q. (By Mr. Gilden) Have you ever heard of a Servo test [387] set? A. It rings a bell, yes.

Q. Have you seen one? A. I have seen it but don't ask me to describe it. I have seen it basically because the engineering portion is probably done in the engineering lab.

Q. Do you know whether Mr. Green worked on the Servo test set? A. In the laboratory or where?

Q. Before he went into the lab? A. I have no idea.

Q. You were in charge of that section as well, were you not? A. I was not.

Q. Oh, you were not? Who was? A. I have no idea who was in charge at that time. That is a completely different entity. That is part of production. Most of your manufacturing companies are segregated into engineering

divisions, manufacturing divisions, personnel divisions and so forth. Engineering designs the basic item, manufacturing produces it.

Q. Well, from what you know about the Servo test set, which obviously more than I know, would you say that you need a certain degree of competence and sophistication and background [388] in electronics to operate it? A. Depends on what he was doing on the job?

Q. You heard his description of the work he was doing in the courtroom, did you not? A. He mentioned he did something on a Servo test set, yes.

Q. Did you hear what he said? A. I can't recall exactly what he said.

Mr. Foote: Your Honor, there was a lot of testimony this morning. I could be mistaken but Mr. Green did not identify it as a Servo test set. Am I mistaken, Mr. Gilden?

Mr. Gilden: He did not. No.

Mr. Foote: I thought the question implied testimony that was not in the record.

Mr. Gilden: I think I have just received some identification of the unit. I think you said you weren't aware of what he had worked on, is that correct?

The Witness: Rephrase that, please.

Q. (By Mr. Gilden) You said you weren't aware—when I asked you certain questions you said you couldn't identify the unit he had described in testimony, is that correct.

Q. That is all. I was just trying to identify it by name. But you have heard of the Servo test unit? A. Yes. The company builds a large number of pieces of [389] test equipment which consists of a metal box with a lid, a hinged lid, inside of that box is a panel. On the back side

of that panel are various harnesses, components, sub-assemblies and so forth. From the outside they are all basically similar, very similar. They consist of harnesses. We do quite a bit of that work in Engineering. Just about every job consists of harnesses, printed circuit board cables and so forth.

Q. You wouldn't know whether or not you need a great deal of talent to work on what—— A. (Interrupting) It depends on what he did on that job. If he designed it, he needed a lot of talent. If he built cables on it or harnesses and so forth, you didn't. Even testing items in production usually consists of two people. Every product we build has to be tested and documented before it is delivered to the customer. Their testing is usually done to a written and complete test procedure.

Q. Were you ever in the decision making with respect to transfers to Cape Kennedy or Cape Canaveral? A. As to who would go?

Q. Yes. A. No. That was usually handled in Mr. Godefroid's areas and various engineers on the program.

Q. Do you know whether a request was made for Mr. Green to go to Cape Kennedy or Cape Canaveral? [390] A. I believe he was approached as to whether or not he has any interest in going.

Q. And do you know who approached him? A. Probably Mr. Godefroid or one of the supervisors under him.

Q. Were you present? A. No.

Q. Did you tell Mr. Godefroid to approach Mr. Green about it? A. Not specifically. I probably told him we have to come up with a certain number of people.

Q. Do you know what Mr. Green's response was? A. I know he discussed it with Mr. Hammond and according to what I was told by Mr. Hammond, Mr. Green decided it would be best he not go down there.

Q. Who was Mr. Hammond? A. Hammond was one of the engineers assigned to the program.

Q. Was he under your control? A. No.

Q. You just knew him in the section? A. Yes.

Q. Did you discuss with Mr. Hammond what Mr. Hammond said to Mr. Green? [391] A. It was discussed.

Q. Were you told that Mr. Hammond said he advised Mr. Green not to go because of—— A. (Interrupting) It was mentioned by Mr. Hammond that because of Mr. Green's race—First of all he mentioned something to the effect that the job would be challenging and interesting and so forth. However that because of his race he may have some problems down in that southern environment.

Q. Did you ever have any discussions with any employees about how Mr. Green would fit into the lab section? A. No.

Q. That you were concerned about how he would fit in? A. No.

Q. You never discussed that with anybody? A. Not to my recollection. I think not.

Q. Weren't you really concerned whether Mr. Green would fit in because of his dress? A. I don't know, to be truthful. I don't know what my inner feelings were. If I felt that he wouldn't fit in I would have turned down the transfer request; I had that prerogative.

Q. Did you ever discuss this matter with Mr. Moehlenkamp? A. Mr. Moehlenkamp came to me; he mentioned that he was contacted by a Mr. Peter Robertson; that much of the discussion [392] I recall. As far as what else was discussed, I can't recall.

Q. Didn't you tell Mr. Moehlenkamp that you were concerned with Mr. Green's eyeglasses or—— A. That I was not——

Q. (Interrupting) Let me finish my question. That you were not concerned with his eyeglasses and how that would affect his ability to identify the wires, but you were more concerned about his dress and how he would fit into the department? A. I cannot recall ever saying that to Mr. Moehlenkamp.

Q. You don't recall that at all? A. I do not.

Q. Weren't you concerned about how a Negro would fit in an all-white department? A. No.

Q. A Negro with a beard and the way he dressed? A. No.

Q. What? A. No.

Q. The final decision on the totem pole was yours, was it not? A. No.

Q. You mean the final decision of how the totem pole was made up was not yours? A. No.

[393] Q. Whose decision was that? A. It went out through various ascending levels of supervision all the way into Personnel.

Q. All right. Who made the decision on the layoff? A. As to who would be laid off?

Q. Yes. A. It was not me.

Q. Do you know a Mr. Graville? A. I recognize the name as a technician.

Q. Yes. Do you know whether he was below or above Mr. Green's name on the totem pole? A. According to that list I had here, he was below.

Q. Do you know whether he was retained? A. He was eventually transferred to another department.

Q. What department did he go to? A. Some department dealing with automation, computers and so forth.

Q. Would that be a promotion or something comparable to the work he was doing in that department, your depart-

ment, the lab section? A. It would still be in the technician rank.

Q. Is it a pretty good job, then? A. Depends on whether he likes it or not. His own impression.

[394] Q. Well, based upon how McDonnell looked at it, it was a pretty good job? A. It was a technician's job, yes.

Q. All right. Do you know how Mr. Graville did on the examination, the test that was administered? A. The first I heard about it was yesterday from that book.

Q. You heard he flunked? A. I heard yesterday that he flunked. That was the first time I was exposed to the results of that test.

Q. Do you know of any other people that flunked that examination? A. Off-hand, no. There may have been another one listed there but I can't recall.

Q. Mr. Graville obviously was a white man? A. Mr. Graville was, yes.

Q. Did you know Mr. Richardson? A. First name?

Q. M. A. Malla, yes.

Q. When you made up this totem pole did you discuss —I think you have already stated you discussed some of these names with various engineers, is that correct? Seeking other opinions? [395] A. Mr. Godefroid and his people did.

Q. Is that right? A. Yes.

Q. Do you recall talking to Mr. Moehlenkamp when you drew up the totem pole? A. No, I do not.

Q. I think you have already testified that some of the people were at Cape Kennedy on this totem pole so therefore they were not considered for layoff, is that correct? A. They were not considered surplus.

Q. Surplus? A. I had nothing to do with determining who would be laid off or transferred.

Q. But they were not surplus? A. They were not surplus because in the best interest of the company it would have been a poor decision at that time.

Q. If Mr. Green were at Cape Kennedy he would be in the same category as any other man on this totem pole and would not be considered surplus, is that correct? A. That would probably be true, yes.

Q. OK. You testified about someone being a lab technician A who was declared surplus, is that right? A. Yes.

Q. What was his name? [396] A. Mr. Havermann; he was laid off.

Q. There were some people under him who were lab technician A's, were there not? A. On that ranking?

Q. Yes. A. Yes.

Q. OK. They were retained? A. They were.

Q. How many lab technician B's were retained after you got rid of all your surplus in that department? A. I cannot recall the number.

Q. Would you say that there was a different quality of work being done by the various technicians in this laboratory? A. We had different levels of work being done within the laboratory, yes.

Q. If you had different levels of work being performed where would you place Mr. Green's performance, on what level?

Mr. Foote: I'm not sure I understood the first question correctly. Just for clarification, when you said quality did you mean the quality of work done by each man or the kind of work?

Mr. Gilden: I said different levels. I am just trying to place him, to find out first what level Mr. Green was on.

[397] Mr. Foote: Could we have a clarification of what you mean by quality?

The Witness: Would you rephrase it?

Mr. Gilden: You said there were various levels of work being performed.

A. Yes.

Q. (By Mr. Gilden) That is my first question. A. Yes.

Q. My second question is, where was Mr. Green, on what level was Mr. Green? A. Based on his performance while he was a lab technician B I feel that he was properly placed; yes.

Q. All right, were levels within lab technician B? A. No.

Q. Everybody was doing the same work? A. No, I cannot say that. They were doing similar type work.

Q. Well, were there some jobs that you would consider required greater talent and some that might take less talent? A. There probably were some, yes.

Q. If you were, and you were the supervisor during this whole time—— A. I wasn't supervising that particular area. I was—Let's understand one thing. The work on the Gemini simulator [398] was being built in a remote area. It was, oh, I would say, a quarter of a mile away from my other operation.

Q. Who was the supervisor of that particular project? A. Mr. Godefroid—the project or the technicians?

Q. Of the technicians? A. Mr. Godefroid was responsible for the technicians, he and Mr. Holzhauser.

Q. And he was then accountable to you, is that correct? A. Yes.

Q. Did he report to you the type of work that Mr. Green was performing? When I say "he", Mr. Godefroid. A. I can't recall that he went out of his way specifically; I know on the evaluation sheet Mr. Green was evaluated as doing average type of work for a technician B. I know

that I had not received any commendations from any engineers pertaining to his work and usually when a man is doing outstanding work or doing exceptional work or something of that sort, the engineers will come up and say, hey, so and so is doing a darn good job.

Q. We have used the word clock number, what does that mean? A. That is the number assigned to an employee when he comes into McDonnell. That number is an identification number that stays with him for the rest of his days with the company.

Q. The lowest clock number means a fellow has been there [399] longer. If I had a clock number of five, that would mean I was there longer than a person with a clock number of ten or fifteen? A. In most cases, if it was continuous employment, that is true. However, if a guy works with a company a year or two and quits and comes back ten years later he still gets the same number assigned.

Q. He still has the same number? A. He still has the same number.

Q. Beginning with lab technician B, I think the first name was Lersch, is that correct? A. Um hum.

Q. Will you tell the Court whether Mr. Lersch—I will mention the names here, Lersch, Richardson, Urzi, U-r-z-i, —— A. Um hum.

Q. ——Gaffney and Kenney, K-e-n-n-e-y, had lower or higher clock numbers than Mr. Green? A. I would say offhand they were higher clock numbers.

Q. Which would mean what? A. They had less seniority with the company.

Q. I see. With the company? A. Than Mr. Green did, yes.

Q. OK. By the way, of the engineers you consulted with on the placement of men on the totem pole, how

many of those engineers were black and how many were white? [400] A. I can't recall.

Q. Were there any black engineers? A. Yes. We had some, I can't tell you the exact number we had. Fairchild, I believe, was one.

Q. In the year 1964? A. Yes. I know one specifically. I don't know if there were others.

Q. Do you know whether he was consulted on the totem pole? A. I do not know. We did not select them whether they were white or colored.

Q. Was he in this lab section? A. No. He was part of engineering.

Q. I am talking about engineers in the lab section? A. He was part of the engineering group that the laboratory supported.

Q. I just asked about engineers in this lab section where Mr. Green worked. How many black engineers did you have? A. I have no idea. The engineers did not report to me.

Q. All right, sir. Now, Mr. Jeffress, when he made the move in 1962, was that correct? A. I do not know. I know he transferred in, I cannot tell you specifically the date.

Q. Would you say it was about the time that Mr. Green—— [401] A. (Interrupting) I would say it was about that time, yes.

Q. When Mr. Green was talked to and the move was not made, is that correct? A. It was approximately that period.

Q. Do you know who had more seniority at that time, Mr. Jeffress or Mr. Green? A. I do not know.

Q. Were you in a position to determine the quality of each man's work at that time? A. Prior to their transfer?

Q. Yes. A. No. They worked in the Production Department.

Q. You knew nothing about the quality of their work, did you? A. I was not involved with it. I did not know the quality of their work.

Q. In making the totem pole up, was length of service a criteria in placing men on this totem pole? A. No.

Q. I will let you read paragraph 2.3 of your memo. A. It says time within the department most likely. 2.3?

Q. I think it is the memo number. A. OK.

[402] Q. Read the memo number first. A. Memo number 9575053, paragraph 2.3. Mr. Green mentioned he did not get the same training as other new technicians in the department, in which their first three to five days were spent being taught soldering and assembly techniques and familiarization with various MAC process specifications. This is true. But considering the fact that he already had spent five years at MAC doing exactly this type of work, it was highly unlikely that any training would be required.

Mr. Gilden: Thank you, sir. Is that the end of the paragraph?

The Witness: That is the end of the paragraph.

Q. (By Mr. Gilden) Isn't it true, Mr. Sinecki, that Mr. Green was given work to perform in the lab section which wouldn't have very much talent to it or sophistication because inevitably there would be a layoff and he would be one of the people destined to be laid off. A. No.

Q. And that it was a planned and concerted effort on the part of the people in that department? A. It was not.

Q. And that the whole purpose of the totem pole in the way it was designed was for the purpose of having Mr. Green [403] surplused and laid off? A. It was not. This

totem pole was generated, or, let's say back in about April, and at that time, in April, I don't believe I was aware of any, or that we would be given a specific number of people to cut back.

Q. What if I told you that the decision was made July 15th of 1964? A. Of what?

Mr. Foote: What is the question?

Mr. Gilden: I haven't finished my question.

Mr. Foote: Excuse me.

Q. (By Mr. Gilden) Let's assume that the decision was made July 15th, 1964, one day after Mr. Green had climbed the Arch, that the totem pole was designed and made up at that time and the people were destined for layoff at that time, and that the plan was designed because of his climbing the Arch to have him laid off. Would that be true or false? A. That would be false.

Q. Do you know how many people lower than Mr. Green retained their jobs on the totem pole? A. I believe twelve, fourteen, fifteen.

Q. Did you ever see this test that Personnel wanted to give? A. No.

[404] Q. What kind of work do you do at the present time? A. I am manager of the Engineering Lab at Conductron.

Q. Do you have anything to do with personnel? A. What do you mean by personnel? People in the department.

Q. Hiring for your department? A. No. The only hiring I do now, I have five levels of supervision reporting to me, and the only hiring I do would be as replacement for one of those people. All other hiring, be it technicians or planning type people, are done by the supervisors of the individual areas.

Q. Are there tests administered at Conductron at the present time? A. For what category?

Q. For various categories. A. I don't know whether—as far as the production people, they probably do. I cannot give you an absolute yes or no. I do not administer tests, any tests, for the technicians.

Q. Did you ever discuss with Mr. Godefroid setting up some test bundles that would have some errors in it and see whether or not you could get Mr. Green to work on these? A. No, I did not.

Q. Mr. Jeffress was finally made a lab technician A, was he not? [405] A. Yes.

Q. Do you know when that took place? A. No.

Q. Did you—— A. (Interrupting) Oh, wait. Excuse me. Let me think. Yes, he was made a lab technician A.

Q. Do you know when that took place? A. No.

Q. Did you have anything to do with that? A. Again, it was recommended by the lower levels of supervision and I had a choice to either concur with it or reject it, yes.

Q. Did you have anything to do with Mr. Green's pay? A. In what respect?

Q. Well, his weekly check or bi-weekly, or how often was he paid? Did you have anything to do with the check that Mr. Green received? A. It was handed down through supervision.

Q. Well, was it ever given to you, did you ever have control over it? A. I can't recall ever having his check.

Q. Do you know whether someone placed in his pay envelope a clipping relating to his climb of the Arch? A. This is the first time I have heard of it.

[406] Q. This is the first time you ever heard this? A. I can't ever recall hearing that before.

Q. Mr. Robertson never discussed that with you? A. I cannot recall, he may have. It may have slipped my mind, I don't know.

Mr. Gilden: That is all, Your Honor.

The Court: Any redirect.?

Mr. Foote: I think I have about two questions only, Your Honor. I would ask the Court's indulgence for one or two questions I forgot on direct, in the light of the fact he is not going to be available.

The Court: All right.

Redirect Examination, by Mr. Foote

Q. Mr. Sinecki, you testified that there was some discussion at the time of Mr. Green's layoff concerning the charges that he had made. In connection with the investigation that was made into these charges, you had some conversation with Mr. Robertson, didn't you? Peter Robertson? A. Yes.

Q. One of those took place at the plant? A. Yes.

Q. And another one took place in your home, is that correct? [407] A. That is correct.

Q. Will you tell me how that conference in your home came to be, how was it set up? A. I received a call from him.

Q. About what time, sir? A. This was after dinner; mentioning he would like to come over that evening and discuss, I guess, the case, and would it be all right with me.

Q. Was this the evening after the first conference with Mr. Robertson? A. Yes, the first conference was at McDonnell.

Q. It was that night, is that right? A. Which one?

Q. The conference in your home was the evening of the day in which the first conference had taken place? A. I believe so. Yes. OK. Then he asked whether I would be receptive to him coming out that night, so I told him of course I would be. I don't know if he gave me a specific time or not.

Q. What time did he arrive? A. He eventually showed up. I would say it was at least 10:00 o'clock at night, because my wife was already in bed. The reason I remember that is because the next day she said, why didn't you talk louder? I couldn't hear.

[408] Q. Anyway, he came in? A. He came in and he apologized and he mentioned he would rather talk to me in an environment different from what it was at work. He apologized for putting pressure on me at work in front of my superiors and so forth and embarrassing me and that sort of thing. He felt we can now talk without this cloud above us or my saying certain things in front of McDonnell personnel. We discussed various things which mostly were reiteration of what we spoke of that day. He stayed I would say half an hour to an hour, something along those general lines. He did ask me, I would say he repeatedly asked me whether deep down don't you feel that you do have some discriminatory feeling, and I kept insisting that I did not. That was one point it seemed he was making an issue of.

Mr. Foote: No further questions, Your Honor.

The Court: Let me ask you a question. You have testified that in your opinion Mr. Green was qualified to be a B lab technician?

The Witness: Yes.

The Court: Based on your experience and knowledge of Mr. Green, do you have an opinion about whether he is qualified to be an A lab technician?

The Witness: Your Honor, in order to be a lab A technician, you mainly have to prove yourself while you are a [409] lab technician B. And the proof is usually through supervisory evaluation, which in this case, I think Mr. Green was consistently evaluated by his supervisors as being an average or a little above average type technician, and also some various engineering personnel that will come up and say, so and so is doing a good job, and also some other engineers when programs are started, quite often we get requests from these engineers. When a program first starts you compile your staff requirements and so forth, and it is quite common for an engineer to come up and request a particular technician by name. I have never had any request from any engineers for Mr. Green to be assigned to their program that I can recall.

The Court: What is your opinion as to his qualifications?

The Witness: Based on the criteria that I used as to whether or not a man is qualified, I would have kept him, I would say, for the immediate future, still as a lab technician B.

The Court: Any questions, gentlemen?

Mr. Foote: No, sir.

Mr. Gilden: No questions, Your Honor.

The Court: Thank you, sir.

We will recess until 10:00 o'clock tomorrow.

(Thereupon, the Court declared a recess until [409A] 10:00 o'clock a.m. the following day, January 14, 1970, at which time court was duly reconvened, the parties appeared and the following proceedings were had:)

[410] Morning Session

Wednesday, January 14, 1970; 10:00 O'Clock A.M.

The Court: Proceed.

Mr. Foote: I believe I have an agreement from Mr. Gilden that I may read a few brief additions to the parts of the deposition of Mr. Windsor and Mr. Krone that were read in his case yesterday.

In Mr. Windsor's deposition on page 39, I would offer into the record the following question:

Q. "Was that also one of the reasons why you didn't employ him?"

A. "No."

That is half-way down the page.

The Court: Wait just a minute. I don't understand what you are talking about.

Mr. Foote: He offered into the record yesterday parts of the deposition of Mr. Windsor.

The Court: Read back far enough so I can tell what you are talking about.

Mr. Foote: Mr. Gilden offered yesterday the following question.

Q. "Now, you were aware that Percy Green had climbed the Arch, were you not?"

A. "Yes."

I am offering the next question and answer:

[411] Q. "Was that also one of the reasons why you didn't employ him?"

A. "No."

Then Mr. Gilden offered the next question:

Q. "Were you also aware that he had been involved in civil rights activities around the Southwestern Bell Telephone Company and Union Electric Company?"

A. "I was aware of that."

I am offering the following question and answer:

Q. "Were those also reasons why you didn't hire him in July 1965?"

A. "No."

That is the only addition to Mr. Windsor's deposition.

From Mr. Krone's deposition, on page 43 Mr. Gilden offered the following questions and answers:

Q. "That is what I meant. Now, did you know that Mr. Green had climbed the Arch?"

A. "He told me he had; yes."

Q. "When did he tell you that?"

A. "At our first meeting."

I would offer the following questions and answers:

Q. "Did you know that prior to the time that he mentioned it?"

A. "I wasn't aware of it."

[412] Q. "You had not read it in the newspapers?"

A. "If I had, it hadn't registered with me."

Q. "And actually, the only relationship between Mr. Green and the Arch was conveyed to you at the meeting he had with you, is that correct, the only meaning it had for you?"

A. "The first time I knew of Mr. Green and the Arch was when he told me of his experience. I think he showed me a newspaper picture of him on the Arch."

Two lines down Mr. Gilden offered the rest of the testimony on that page, which is page 44, excluding the last line. It has to do with Mr. McDonnell's notifying Mr. Krone about the picketing in front of his house. I would offer the following testimony, starting at the bottom of page 44:

Q. "And what did he tell you—when did he tell you?"

A. "About that time."

Q. "What did he say to you?"

A. "He wanted to know what the situation was and why. I explained the entire story to him and he asked me to review it once more to make sure that equity and justice be done; and that is in quotations."

Q. "From what?"

A. "As far as Mr. Green's employment with our
[413] company is concerned."

Q. "Did you review the matter?"

A. "Once more; yes."

Q. "Did you report to him?"

A. "Yes, sir."

Q. "And when did you report to him?"

A. "Within a week, I would say."

Q. "And who was there at the meeting?"

A. "I don't believe it was a meeting. I believe it was a telephone conversation."

Q. "And where was he at the time?"

A. "In his office, probably."

Q. "And were you reviewing the matter with respect to the question of discrimination?"

A. "I said to meet the test Mr. McDonnell made of equity and justice."

Q. "Well, I don't understand. What does that mean to you, sir?"

A. "Were we treating Mr. Green as we would have treated anyone else under those circumstances."

Q. "And what was your conclusion?"

A. "The conclusion was that we were treating Mr. Green as we would have treated anyone else; as we did treat the other gentlemen in this particular circumstance."

[414] Q. "And after you had this conversation with Mr. McDonnell, what did he say?"

A. "Perfectly satisfactory."

Your Honor, if I may take a moment, I think we might be able to save some time in this. We have subpoenaed the officer who arrested Mr. Green. I don't believe there are any facts in dispute. Perhaps we can save calling him and save the Court's time if we can work it out.

The Court: Very well.

(At this point there was a conference between Mr. Foote and Mr. Gilden off the record.

Thereafter, the trial was resumed on the record.)

Mr. Foote: Your Honor, with this stipulation I think we will not be calling the officer who arrested Mr. Green. I offer the following stipulation, Mr. Gilden; that Mr. Green's arrest on October 21st, 1964, the one that Mr. Green has testified about, took place at a spot on Brown Road just north of a stop sign, the first stop sign north of Brown Road, in other words approximately one hundred to two hundred yards north of Highway 70 on Brown Road.

Mr. Gilden: Is that feet or yards? You said a hundred yards.

Mr. Foote: OK, approximately one hundred yards north of Highway 70 on Brown Road.

[415] Mr. Gilden: That may be stipulated to, Your Honor.

The Court: Very well.

Mr. Foote: At this time I would offer Exhibits A and B into evidence.

Mr. Gilden: What is A?

Mr. Foote: A is the plan.

Mr. Gilden: I will object to A, Your Honor; there has been no foundation laid for it.

Mr. Foote: The foundation, I believe, Your Honor, was laid in the examination of Mr. Green who, as I recall it, testified that this was the plan that CORE was following about the stall-in; that he was acting under the plan when he stalled his car; at the time he was acting under the plan. He testified in some detail from this Exhibit A. I think there is a foundation. I think it is relevant.

Mr. Gilden: Your Honor, I don't recall the testimony that way. I don't recall that Mr. Green testified he was operating under this plan; in fact, the testimony as I recall it, of course the evidence in the record will bear out whether Mr. Foote or I is correct in our interpretation of the testimony. As I recall it, he did not prepare this document. The testimony was that to his best knowledge it was prepared by people in CORE and not by him. The question was asked whether there were any notations by him on any of these pages, and he said there was something that might be his handwriting. He wasn't sure about [416] that. That was page 3.

Mr. Foote: It appears to be his handwriting.

Mr. Gilden: That is only on one page of the four-page document. If Mr. Foote wanted to get this into evidence, he could call very readily the chairman of CORE at that particular time to find out if this was a plan of action of CORE on that particular date. There has been no foundation laid for this document.

Mr. Foote: Are you saying that Mr. Green's testimony was to the effect that this was not the plan of action of CORE?

Mr. Gilden: It may have been the plan of action of CORE but he didn't know it as such. He had nothing to do with the preparation of it. He was there in accordance with some information he received about being there.

He said, I am not sure whether the testimony reflects whether he received it or whether you asked that question of him or when he received it.

You haven't laid a foundation for this document.

The Court: Let me see it.

(Mr. Foote hands exhibit to the Court.)

The Court: The Court will receive it in evidence.

Mr. Foote: Exhibit B is Mr. Sinecki's list of people on the totem pole.

Mr. Gilden: No objection to Exhibit B, Your Honor.

The Court: Very well. A and B may be received.

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[417] **WILLIAM W. WILLIAMS**

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Foote

Q. What is your name, sir? A. William W. Williams.

Q. Where do you work, Mr. Williams? A. Conductron in St. Charles.

Q. Conductron has previously been identified in this record as a subsidiary of McDonnell, which used to be the E.E.D. Department. Is that your understanding? A. Yes.

Q. Before you worked for Conductron did you work for McDonnell when it was in that capacity? A. Yes.

Q. How long did you work for McDonnell? A. I started in '58, January '58.

Q. In 1962 what was your job and your grade at McDonnell? A. I was given the task of supervising.

Q. Just your job, what was your job title, what kind of job was it? A. My job title?

Q. Yes, sir. A. Development technician.

[418] Q. Is a development technician higher or lower than a technician B? A. Higher.

Q. Is it higher or lower than a technician A. A. Higher.

Q. In what department were you working as a development technician? A. 958.

Q. In 1962 in that capacity as a development technician, did you have occasion to meet Percy Green? A. Yes.

Q. Do you recognize Mr. Green in the courtroom today? A. Yes.

Q. What was the occasion for that meeting? A. He was——

Q. (Continuing) Or for making his acquaintance? A. He was in the same room or area where I was working, supervising some union personnel, women, which they were fabricating parts. His task was to test these parts after they were fabricated.

Q. These women were working under your supervision? A. Yes.

Q. Approximately how long did you work in that capacity with Mr. Green? [419] A. I supervised the women a little over a year.

Q. How long did Mr. Green work testing the equipment that the women were making? A. This I don't know how long.

Q. Approximately; was it a day or a week? A. No, it was months. Half a year or more.

Q. So you knew him to speak to and to see, is that correct? A. Yes.

Q. And recognize? A. Yes.

Q. And he knew you to the best of your knowledge? A. Yes.

Q. Did you have occasion after 1962 to see Mr. Green during the summer of 1963? A. Yes.

Q. Where were you at the time you saw him? A. In Building 102.

Q. Where in Building 102? A. At my lab bench working; it is upstairs, the second level.

Q. At the time that you saw him during the summer of 1963, what was your grade? A. Development technician.

[420] Q. The same as it had been? A. Yes.

Q. At the time you saw him specifically what work were you doing? A. I was building a cable.

Q. You were sitting at a bench? A. Yes.

Q. And building a cable? A. Yes.

Q. Where was Mr. Green when you saw him first? A. He was directly behind me.

Q. Was he alone or with someone else? A. He was with somebody else and I think it was Mr. Godefroid.

Q. You say you think it was Mr. Godefroid? A. Yes.

Q. Are you absolutely certain of that or not?

Mr. Gilden: I didn't understand the first part.

The Witness: No.

Mr. Foote: Is there an objection?

Mr. Gilden: Go on, that's all right.

The Witness: I'm not sure that it was, whether it was Mr. Godefroid or not.

Q. (By Mr. Foote) To the best of your recollection it [421] was Mr. Godefroid but you are not absolutely positive, is that right? A. That is right.

Q. Whether it was Mr. Godefroid or somebody else, is it your best recollection that whoever it was with Mr. Green was a supervisor?

Mr. Gilden: I will object to that, Your Honor. There is no testimony on this. That is leading the witness.

Mr. Foote: I will withdraw the question.

Q. (By Mr. Foote) To the best of your recollection do you know what the capacity was, the job of whoever it was who was with Mr. Green? A. It was a supervisor.

Q. What did the two men, that is Mr. Green and whoever it was, do while they were standing behind you? A. Whoever was with him, the supervisor who was with him was explaining the work.

Q. What you were doing? A. That I was doing.

Q. Did Mr. Green make any comment? A. Yes.

Q. What did he state? A. He made a comment similar to, I am surprised to see Williams and Beauchaine doing this work.

[422] Q. Who is Mr. Beauchaine? A. He is another technician working at the bench beside me.

Q. Was he working physically close to you, at the same bench? A. Yes.

Q. At the time that this all occurred, what was Mr. Beauchaine's title or grade, rather? A. Tech A or development tech, I'm not sure.

Q. Both of which are above Tech B? A. True.

Q. The work that you and Mr. Beauchaine were doing, as I understand your testimony, was building a cable? A. Yes.

Q. Is that correct? A. Yes.

Q. Do you remember anything else of this or was anything else said during the time that the two men stopped behind you? A. I don't recall what else was said.

Q. After they got through talking, did you see where they went next? A. As far as I can remember, they continued on to the next bench and hesitated and on down to the end of the lab.

Q. The supervisor and Mr. Green? [423] A. True. Yes.

Q. Did they stop at the benches? A. Yes.

Q. Did they, to the best of your recollection, did they look at what was going on? A. They stopped and looked at something; whether there was anything said or not, I don't know.

Q. Did Mr. Green ever work in that same room where all of this happened, to your knowledge, when he was a technician? A. As far as I know he did not.

Q. So as far as you knew, at the time that this happened this room that you were working in was not the normal place of work of Mr. Green, is that right? A. Yes.

Q. To the best of your recollection what was Mr. Green and the supervisor doing? What did you take to be their purpose there?

Mr. Gilden: I object to that, Your Honor, unless he knows what the purpose is. What is subjective in his mind is of no consequence in this lawsuit.

The Court: Do you know what they were doing?

The Witness: I assumed he was getting a tour through the lab.

Mr. Gilden: Your Honor, I will object to the reply.

[424] The Court: You don't know that?

The Witness: No, I don't know if that was the purpose of their being there.

The Court: OK.

Mr. Foote: No further questions.

Cross-Examination, by Mr. Gilden

Q. Mr. Williams, I believe you testified that this was in 1963, is that correct? A. This was what, when I knew Mr. Green?

Q. No, when you saw Mr. Green in back of you with someone you believed to be a supervisor? A. Yes.

Q. That is seven years ago? A. True.

Q. Have you discussed this matter with anyone prior to coming in here this morning? A. Yes.

Q. Who did you discuss it with? A. Mr. Foote.

Q. Did he refresh your memory in any way? A. Refresh my memory?

Q. Yes. A. He asked me some questions.

[425] Q. He what? A. He just asked me some questions like he did previously before you came.

Q. About what happened? A. Yes.

Q. I see. Now you have been with McDonnell since 1958, is that correct? A. No.

Q. I thought you said '58. A. I started with McDonnell in 1958. I now work for Conductron.

Q. I see. But you were with McDonnell from 1958 up until what date? A. 1966.

Q. All right. Now you are a development technician at the present time? A. No.

Q. What are you now? A. I am a technician supervisor.

Q. But at that particular time in 1963 you were a development technician? A. Yes.

Q. When did you first get that title? A. '62, I think, I'm not sure.

[426] Q. Now this was known as the E.E.D. Department, Department 958, is that right? A. Yes.

Q. What sort of an area did the E.E.D. occupy of McDonnell Aircraft Corporation at that time? When I say sort, how big an area? A. It was the second floor of Building 102 at this particular time. The lab area was four rows of benches, approximately five benches long, six-foot benches.

Q. All right. Now you worked there in this section in the year 1963? A. Yes.

Q. Did you work there in the year 1964? A. No.

Q. What happened in 1964? A. The lab area moved to Building 101.

Q. When you say the lab area, would that be Department 958 you are talking about? A. Yes.

Q. Now I believe your testimony was that you did not work in the same area where Mr. Green worked in this section, is this correct? A. In 1958?

Q. 1963. [427] A. 1963?

Q. Is that correct? A. That is correct.

Q. What about 1964? A. Yes, I worked in the same area where Mr. Green worked. It was a short time and I can't recall.

Q. You just don't recall, then, in 1964? Is that correct? A. No. I was stationed at Emerson Electric for McDonnell in 1964.

Q. Well, did you work over at McDonnell at all during the year 1964 in this section? A. Yes.

Q. But you don't recall whether Mr. Green worked in the same area with you during that period? A. Yes. I do not.

Q. All right. Now you said that on this particular occasion, this occurred in 1963. Can you give me the month when it occurred? A. In '63?

Q. Yes. A. No.

Q. Do you know the date? A. No.

Q. You stated you were performing some work on a particu- [428] lar date in question when you saw Mr. Green in back of you, is that correct? A. Yes.

Q. What kind of work were you performing at that time? A. I was building a cable.

Q. All right, you were a development technician, I believe, which has a higher classification than lab technician A or lab technician B at that time, is that correct? A. Yes.

Q. Were there engineers in that lab section during that year? A. Were——

Q. Who were employed there? A. Well, normally an engineer has a desk in a different area and they come in at various times.

Q. Do these engineers supervise the work and look over the quality of your work from time to time? A. No.

Q. They do not? A. As far as I know they don't.

Q. Do they ever look over the quality of the work of the lab technicians A and B? A. I don't know.

Q. Well, do you ever see them over there looking over the [429] quality of the work they perform? A. I see engineers or I have seen engineers in the lab area looking over their particular jobs. What they are doing at the particular time, they may be looking over the quality of the work.

Q. But they never looked at the quality of your work? A. I had inspectors look at the quality of my work.

Q. The engineers had nothing to do with you? A. At certain times, no.

Q. All right. A. I worked with engineers, yes.

Q. But you don't know whether the engineers were looking over the quality of the work of the lab technicians. That is something you wouldn't have any information about at that time? A. That is right.

Q. To your knowledge how many white engineers were there in the vicinity in which you worked or supervised

the work that you were performing at that particular time? A. Supervised my work?

Q. Were there any black engineers? A. I don't know.

Q. Did you ever see any? A. Yes.

Q. When? [430] A. I have just seen them; when, I have no dates.

Q. Do you know whether they were ever assigned or did any supervisory work in the lab section in which Mr. Green worked? A. I don't know where Mr. Green was working in the lab.

Q. Do you know how long Mr. Green worked there?

Mr. Foote: Where is this?

Q. (By Mr. Gilden) In the lab section. A. What lab are you talking about?

Q. Well, the lab area of Department 958? A. He was in another building than I was working at, from what I heard yesterday.

Q. Then actually, your section went over to another building, is that correct? A. When? We moved from Building 102 to Building 1.

Q. Did Mr. Green's group move to that same building? A. I do not know if he was working in Building 1.

Q. You don't know whether he was working there at all, is that it, in Building 1? A. I heard yesterday; I do not know personally, no.

Q. I see. Now you said that you heard some voices in back of you as you were sitting there performing your work? A. I heard my name mentioned.

Q. Did you turn around? [431] A. Yes, I did.

Q. Do you recall Mr. Green being present, is that correct? A. That is right.

Q. But you don't recall who the other party was? A. Not—No.

Q. Well, you made a statement to this Court it was either Mr. Godefroid or some other supervisor? A. True.

Q. Is that your testimony? A. Yes.

Q. How do you know it was a supervisor? A. How do I know it was a supervisor?

Q. Yes. A. I don't know.

Q. You don't know? A. No.

Q. How long did they stand in back of you? A. A minute.

Q. One minute? A. Minute and a half; I don't know, I didn't time them.

Q. Just about a minute or minute and a half? A. A short time.

Q. I see. But you recall this seven years ago? [432] A. Yes. I have went over this before, though.

Q. Who did you go over it with? A. Somebody in '64.

Q. In '64? 1964? A. Yes. That's right.

Q. Who was that? A. Somebody investigating in Mr. Green's behalf. I do not remember the name.

Q. Did you write a report up for the company? A. I did not.

Q. Did you write a report for anybody? A. I did not.

Q. Now tell us exactly what you heard in back of you, Mr. Williams? A. Exactly?

Q. Yes. A. I don't know if I can say it exactly. It was similar to, I am surprised to see Williams and Beauchaine doing that type of work.

Q. And Mr. Green said that? A. Yes.

Q. Who is Mr. Beauchaine? A. He is another technician who was working beside me.

Q. Was he a development technician, a technician A or B? [433] A. I think he was a tech A at the time.

Q. At that particular time? A. Yes.

Q. Where is Mr. Beauchaine now? A. He works at Conductron.

Q. With you? A. Yes.

Q. What is his title at the present time? A. He is a technician specialist.

Q. Really, Mr. Williams, you wouldn't know whether Mr. Green was being taken on a tour at that time, would you? A. I wasn't asked or told, no.

Q. You were never told that? A. No.

Q. So you really don't know why they were in back of you, do you? A. No.

Q. OK.

Mr. Foote: No further questions.

Mr. Gilden: I am not finished yet.

Mr. Foote: I beg your pardon.

Q. (By Mr. Gilden) Do you know Mr. Jeffress, Mr. Williams? A. Yes.

Q. How long have you known him? [434] A. Five or six years.

Q. Do you know what he is doing at the present time? A. I do.

Q. What? A. I do.

Q. What does he do? A. He is a foreman at Conductron.

Q. He is over at Conductron? A. Yes.

Q. Do you know when he was made foreman? A. No.

Q. When did you first know Mr. Jeffress? A. As far as I can remember, it would be in '66, '65 or '66.

Q. You didn't know him before that? A. I don't remember.

Q. What kind of work was he doing in '65 or '66? A. Technician work.

Q. Where? at McDonnell or Conductron? A. In '66 it was Conductron.

Q. '65 it would have been—— A. We moved over there in December of '65.

Q. I see. He would have been working at McDonnell Aircraft prior to that time? [435] A. Yes.

Q. Do you know what his title was before he moved over? A. I do not,

Q. Do you know what area he was working in at that time? A. No.

Mr. Gilden: I have no further questions.

Mr. Foote: No further questions. You may step down, Mr. Williams.

(Witness excused)

ROBERT L. GODEFROID

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Foote

Q. What is your name, please? A. Robert L. Godefroid.

Q. Where do you work, Mr. Godefroid? A. Conductron Missouri.

Q. You have heard the testimony this morning about Conductron and how it used to be McDonnell, have you not? A. Yes.

Q. Did you work for McDonnell before you worked for Conductron? A. Yes.

[436] Q. How long did you work at McDonnell? A. Since 1956.

Q. What was your job in 1956 and on through to where McDonnell turned into Conductron, please? A. I started in 1956 as a technician, grade unknown, and after, I would say four years or five years, I was kind of promoted as a lead technician. There again there was no official promotion or official title. It was just sort of a senior technician that had three or four technicians doing work that I kind of supervised. In 1961 I was promoted to a salary grade which had a title as lab supervisor. In '66, it must be—November of '65, as I recall, I left the technician group and went into maintainability engineering.

Q. So from the time you joined McDonnell until 1965 you were working in the job or in the vicinity of the lab technicians, is that correct? A. Right.

Q. What was your precise responsibility in 1963? I beg your pardon, 1962? What was your title? A. In '62 I am sure I was a supervisor, a laboratory supervisor in charge of technicians which were doing work in the Engineering Department.

Q. Was there a number for that department? A. 958.

[437] Q. Do you know Percy Green? A. Yes.

Q. When did you first meet him? A. Sometime in 1962 or 3.

Q. Under what circumstances? A. An interview as related to his request for a transfer into the technician group.

Q. What did you say and what did he say? A. I don't recall the exact words of what was said in the meeting. We had a conference in the conference room, Mr. Sinecki, myself and Mr. Green. We more or less explained what type of work we did in the lab.

Q. Let me ask you this, sir, and interrupt if I may. You heard Mr. Sinecki's testimony yesterday about what was said at this first interview, did you not? A. Yes.

Q. Would yours——

Mr. Gilden: I am going to object——

Mr. Foote: All right, I will go through it again.

Q. (By Mr. Foote) What did you say and what did he say? A. As far as whether I said it or whether Sinecki said it or Green said it, the meeting itself was a review of what type of work Green would be going if he came in as a technician.

Q. Was that explained to him? [438] A. Yes, I am sure —I mean all of these things, when personnel are going to transfer into our department or when we hire people, we have never—I have never and I know as a fact that Sinecki has never built up the job of technician.

Mr. Gilden: I am going to object to that, that is not responsive to the question.

Q. (By Mr. Foote) Just limit your testimony, please, to what he said and what you said. A. OK. We told Mr. Green what his work would be initially and the chances for advancement. We told him that his seniority would have no bearing on future layoffs. We warned him, or I would say we informed him of the fact we were reaching a peak right about in August of '63 and that when this Gemini simulator was completed there was a good chance there was going to be a layoff. If he wanted to take the chance on his ability and feel that his ability could get him through this layoff, he had a good chance of becoming a good technician. But he would have to prove himself in a relatively short period of time and he is going to have to prove himself on doing work that is not really going to tax his capabilities.

Q. This is what was told to him in this interview? A. This is exactly what was told to him. It was sort of a risky time to make a transfer when a man has got seven years of union seniority. He was not going to come in

and jump [439] right into a design effort with an engineer. He had to be some time in the department to become familiar with departmental procedures and policies before we really knew what he was capable of doing and what we could assign him to.

Q. Do you recall any conversation about dress and the technician's clothes? A. No.

Q. Do you recall any conversation about tinted glasses? A. I think there was a comment made, and I am sure it was Mr. Sinecki who asked why the tinted glasses.

Q. Did Mr. Green answer? A. Mr. Green said he had medical reasons or there was a reason for his tinted glasses, they were not sunglasses.

Q. When was this meeting? A. Sometime in 1963.

Q. This was the first time you had known Mr. Green or met him? A. This was the first time I had met Mr. Green.

Q. He was subsequently transferred into Department 958, is that right? A. Right.

Q. As a tech B? A. Right.

Q. How many tech B's were there at the time he was [440] transferred? A. Twenty-five or thirty.

Q. Did you know them all personally? A. I knew them all, yes.

Q. At the time that Mr. Green was a technician in your Department 958, at any time was there a technician by the name of David L. Lowe? A. No.

Q. Approximately how many technicians all together were there in 958 during this 1963-1964 period, just approximately? A. There were somewhere between ninety or a hundred McDonnell technicians plus fifteen, I think, job shoppers or technicians that we had hired through an outside vendor.

Q. Were you, in your capacity as supervisor, in charge of orienting technicians who came into the department,

whether they were from the outside or from a different department at McDonnell? A. Yes.

Q. How long had you been in charge of such orientation? This is again in approximately 1963, the summer of 1963? A. I would say for better than a year.

Q. During that period of time how many people coming new into 958 had you had occasion to orient or supervise the orientation of? [441] A. I would say in a year or year and a half's time we probably went through seventy-five or a hundred technicians.

Q. During that period of time for those technicians was there a customary procedure followed with employees newly coming into 958? A. Yes.

Q. Will you describe what that procedure was? A. For what type of person? A new employee off the street? Or a new employee transferring from McDonnell Company?

Q. Let's take a new employee off the street first. A. A new employee off the street, his first day was, I would say, a general orientation on how to punch the clock, where the cafeteria was, where the latrine was, then he was given the McDonnell process manuals to look through certain sections that had to do with assembly techniques and more or less given the rest of the day to kind of read through the process instructions, not to try to memorize them but just to get a general knowledge of what is in there and where to find these things.

Q. Um hum? A. On the second day he was given maybe a terminal strip or something and some wires and asked to solder some wires onto a terminal strip. This was mainly to see if he knew how to operate a soldering iron. There are a lot of people who come [442] in claiming they have vast experience that come in and can't even solder a wire. They blob a lot of solder on a terminal, and this is something that will not go through inspection. We have to give

them some sort of a little test, if you may, to see what they could do as far as soldering.

Q. Have you exhausted the procedure followed for new employees off the street, that is, new to McDonnell? A. That is essentially the procedure.

Q. Did that procedure differ any for employees who had been at McDonnell for some period of time in a different department? A. This depends on what department they came from and what type of work they were doing.

Q. Can you explain that? A. Yes. If we transferred someone in who was doing, say, paper work, we would give him the same test on soldering as we would a new employee, but we would not go through administrative procedure type things. We would show him the process specs and say these are process specs, read through them just to get a general idea of what is in there. If we transferred in a man like Percy or any other person who was doing assembly work, an E and R mechanic, or an EE mechanic from a production shop, they have been spending time with these process specs, they know these process specs and it is somewhat ridiculous to give them [443] a process spec and say here, look through these and see what is in them. I mean they should know, if they have been doing any work with McDonnell as far as assembly, what is in the process specs.

Q. Does this orientation procedure, or did it at that time, include any kind of tour, customarily, of the area? A. You say a tour for an employee that was new? Who transferred or off the street to the building?

Q. Yes. A. Yes, he would be shown where the cafeteria was, where the time clock was, where the latrine was, and where I sit and where Sinecki sits if he wanted to see him.

Q. What about for an employee who had been working elsewhere in McDonnell, not new off the street, was it cus-

tomary for such an employee to get a tour? A. Yes. If he was new to the area, I mean.

Q. If there is more to your answer, please give it. A. I know we have got Mr. Green here and he is——

Q. Better just answer the question, we will get to Mr. Green later. The question was just generally for an employee who was, say, in Mr. Green's category, an employee with the company for a number of years that had not been working in your department, was it customary to take him around, show him the work, introduce him to people and take him on a tour? [445] A. No.

Q. Was it substantially the same kind of work that was done by the others? A. Yes.

Q. Mr. Godefroid, I am handing you Plaintiff's Exhibit No. 33 and I invite your attention to the documents behind tab 14. There are a number of documents there. Will you take a look at them and identify them, please? A. They appear to be Xerox copies of the weekly time utilization sheets that were submitted by Mr. Green.

Q. Were these submitted in the normal course of business at the time he was there? A. Yes.

Q. Did other technicians do likewise? A. Yes.

Q. Would you kindly go through each one of these documents, state the date in the lower right-hand corner first, and describe what kind of work the document shows was being done and for how long?

Mr. Gilden: Your Honor, I believe the documents speak for themselves. We have already had testimony on these documents by Mr. Sinecki.

Mr. Foote: Mr. Gilden, if the documents speak for themselves you know a lot more about Gemini simulators than I [446] know. I don't believe they do. I think it takes an expert to interpret them to the Court.

The Witness: Shall I go on?

Mr. Gilden: I believe Mr. Sinecki has already testified to this earlier, has he not?

The Court: What is it you want to show by this witness about these particular documents, Mr. Foote?

Mr. Foote: Your Honor, I would have tried to telescope some of the other testimony but I understood Mr. Gilden objected to duplicating Mr. Sinecki's testimony.

Mr. Gilden: I don't see any purpose in duplicating this, it is repetitious testimony; it has already been introduced.

Mr. Foote: What I intend to show basically was what Mr. Sinecki said except for this. Mr. Sinecki said Mr. Godefroid was much more familiar with the details of what was going on. There has been raised in this case an issue of what was menial and what was not menial, what was technical and what was not, what was desirable and so forth. I would like to get this witness's interpretation.

The Court: Proceed.

A. The week ending October 4th, 1963, in the column headed Unit Name, he has 2A5/2A9, center section and a checkmark under the column marked Fab. Time and hours for Monday [447] is nine hours. It appears that he spent nine hours on the Monday of the week ending October 4th working on the center section of the Gemini Mission simulator doing fabrication type work. Now this could have been bolting a panel together, a bracket together, it could have been putting in these wire harness, it could have been hooking up the wire harness. It was part of the fabrication procedure. In other words, how do you build this thing? These unit numbers 2A5-2A9, identify the particular cabinet.

Q. All right. Now reading down the left-hand column there, without talking about the checkmarks, just state what that line across says. What does it tell you from the record? He spent how much time doing what? A. On

the second line 2A3 power harness fabrication on unit No. 2, he spent four hours on Tuesday.

Q. Did he spend any time that week in what is known as engineering support? A. Going through the checkmarks on unit No. 1 of the Mission simulator on cabinet 19A1, he spent a total of sixteen hours in engineering support.

Q. The rest of the work done that week was fabrication, was that right? A. Right.

Q. All right. The next one dated 11-17-63, just a [448] summary of what the record shows, how much time he spent doing what. A. The first two lines show he did fabrication of harnesses for a total of ten hours that week. The next five lines has Navcor card check-out, and he has checked under there fabrication, and there has been a notation on here that these checkmarks should be over in engineering support where it would have been correct. In other words, the check-out of Navcor cards is under the engineering support charge number.

Q. All right. The document dated 11-24-63, what does that show? A. It shows engineering support, unit name, Navcor cards, and a total of thirty hours for the week spent on engineering support.

Q. That would have been—— A. That would have been checking out Navcor cards or troubleshooting Navcor cards.

Q. The next document 1 December 63. A. It shows a total of thirty-nine hours engineering support, testing Navcor cards.

Q. Is this testing of Navcor cards considered in the department as menial work? A. No.

Q. Is this what would be considered more sophisticated [449] work, more desirable in the department? A. More desirable than what?

Q. Than building bundles? A. Yes.

Q. Basic construction of the bundles? All right. Turning to the next one, which is 12-15-63, that date, what does the document show? A. Twenty hours Navcor cards, forty hours card tests and chassis ring-out.

Q. That would be under enginering support? A. Engineering support.

Q. The document dated 12-22-63, what does that show? A. It shows forty-eight hours engineering support, card simulator No. 2 check-out.

Q. Was that testing, is that what check-out means? A. Testing the cards.

Q. The document dated 12-29-63? A. Forty hours total. Sixteen hours shown under engineering support for GMS No. 2, and sixteen hours shown under fabrication.

Q. What is GMS No. 2? A. Gemini Mission Simulator No. 2.

Q. The one dated 1-5-63 what does that show, please? Just that part of it relating to Percy Green. [450] A. Relating to Percy Green shows forty-seven one-half hours Gemini Mission Simulator No. 2 engineering support.

Q. This would be working with an engineer? A. It would be working on something other than fabrication.

Q. All right. And the document dated 12 January 64, what does that show? A. Engineering support, unit 2, fifty-four hours—I can't make out the—I don't know what his note there was under the unit name. It has GMS and something. Looks like watch man. It shows fifty-four hours engineering support.

Q. All right, 1-19-64, that document? A. It shows fifty-four hours engineering support on unit 2.

Q. Is that for one man or two? A. This is for Mr. Green.

Q. Are you sure that is Mr. Green? There was some question in Mr. Sinecki's testimony about who had forty-

five and who had fifty-four. A. Well, the man that put his name on the line that says "Name", Frank Borchardt, I am assuming is the one that filled in the top line.

Q. If that assumption is not correct, it is at least fair to say that somebody spent forty-five and somebody spent [451] fifty-four doing engineer support work, is that right? A. Right.

Q. And the document 26 January 64? A. It shows forty hours engineering support, eight hours of fabrication.

Q. And the last document behind tab 14, 2-2-64, what does that show? A. Thirty-two hours engineering support, GMS 2.

Q. One more document. 19 February 64, what does that show, please? A. Forty hours engineering support on the Gemini Mission simulator.

Q. Do you know how those records you have just described happened to get to Mr. Robertson? A. We kept all these records in cardboard file boxes for I would say a period of a year at the minimum, because there was always questions as to what the man charged to that particular day or what the man was doing. At the time of or shortly after Mr. Green's layoff, there was an investigation of the layoff and we at that time pulled out some of his records.

Q. Was this at the request of somebody? A. At the request of Mr. Sinecki. I don't know who asked him to do it.

[452] Q. OK. What happened to the rest of his records? A. The rest of the records, I am sure, were discarded.

Q. Was that in keeping with the practice of records of other employees? A. Yes.

Q. Now the work you have described in Exhibit 33, tab 14, the vast bulk of it was enginering support work. The record speaks for itself, I don't mean to characterize it as a vast bulk, but from that record and from your knowl-

edge of engineering support, would you consider that to be menial work? A. No.

Q. To the best of your knowledge did other employees at that time in that lab while Mr. Green was there, consider that kind of work to be menial? A. No.

Q. What about the work you have testified to from that record, from that Exhibit 33, concerning the testing of the cards and so forth? Was that considered to be menial work? A. No.

Q. By you? A. No.

Q. To the best of your knowledge in the common practice out there, did anybody consider that bad work for technicians? A. No.

[453] Q. Do you know, do you have an estimation of whether Mr. Green while he was a lab technician, was given more of what is thought to be menial work in the shop than other lab technicians? A. No.

Q. Is your answer that you don't know or that he was not given? A. He wasn't given any more than anyone else and probably a lot less than a lot of them.

Q. Why do you say that, sir? A. Because there were lots of what he describes as menial work. I don't describe any of it as menial work. I mean the wiring of the harnesses and wiring of the chassis is not menial work. It cannot be done by just any Tom, Dick or Harry. It has got to be done properly. It has got to be done with a little bit of initiative. A man has got to know what he is doing. And I don't think there is any work in the lab that I would consider menial other than when we have to sweep the floor or clean up the machine shop. These are menial tasks. There is not a lot of it, but there is some clean-up work to do.

Q. Who does that or did that at this time? A. Technicians.

Q. Did Mr. Green do any more than his share of that? A. No.

[454] Q. By his share I mean any more than any other technician did? A. No.

Q. In the spring of 1964 it is true, is it not, that you were running out of work in Department 958, the Gemini was becoming completed and you were phasing down? A. Yes.

Q. In connection with that fact some people were laid off in the spring of 1964, is that right? A. Yes.

Q. Was Mr. Green one of them? A. No.

Q. Also in connection with that slow-down of work, were you not notified that you were going to have to declare some of your personnel what you call excess? A. I was made aware of this by Mr. Sinecki.

Q. All right. I mean your Department 958? A. Yes.

Q. How many were ultimately declared excess? A. We, to the best of my recollection, Mr. Sinecki said we would have to come up with twenty-four names. So between him and myself we came up with what we felt would be the most that we could turn loose, which I think came up to about eighteen.

Q. In other words, you were told to come up with twenty-four [455] but you negotiated to eighteen? A. Mr. Sinecki negotiated it down to eighteen.

Q. Whoever did it the result was that eighteen were declared excess? Is that right? A. Yes.

Q. Was Percy Green one of those? A. Yes.

Q. Mr. Godefroid, I will hand you what has been received in evidence as Defendant's Exhibit B, can you identify that, sir? A. Yes.

Q. What is it? A. It is a listing of the technicians as they were placed on the totem pole with respect to each other.

Q. Name, please, the people on that list who were declared excess? A. Hawley, Spence, Havermann, Stillwell, Gourlay, Gaffney, Green, Palmer, McGavern, Swift, Babcock, Silvester, Mitchell, Tate, Marino, Rauscher, Graville, Remlinger and Dodge.

Q. Did you read that from top to bottom on the list, that is from the top standing on the so-called totem pole ranking to the bottom standing on the so-called totem pole ranking? A. Yes.

Q. So, in other words, the names that you read first be-
[456] fore you read the name Green, where people who were rated higher than he on the totem pole, is that correct? A. Yes.

Q. How many men were ultimately laid off? A. I think nine or ten.

Q. Does Exhibit B show their names? A. Yes.

Q. Read them, please. A. Havermann, Green, McGavern, Swift, Babcock, Silvester, Tate, Marino, Remlinger.

Q. You said Havermann? A. Yes.

Q. What was his grade? A. Tech A.

Q. Was he higher than Mr. Green on the list? A. Yes.

Q. Were there any other Tech A's who were declared surplus at this time? A. Yes.

Q. Read their names, please. A. Hawley, Spence, Stillwell and Gourlay.

Q. You have used the term totem pole, what is that? A. It is a listing of, in our case, technicians in, say, a top down ranking of worth to the company.

[457] Q. Was that totem pole from which Defendant's Exhibit B was taken made up in the spring of 1964?

Mr. Gilden: I will object to that question as leading, Your Honor.

Mr. Foote: I won't lead him then.

Q. (By Mr. Foote) When was the totem pole from which Defendant's Exhibit B was taken made up? A. This totem pole was the one that was used for the May review and it was made up sometime in April, 1963-4, whatever the year is.

Q. Is that the only totem pole ever made up? A. This? No.

Q. Have you made up others? A. Yes.

Q. On a periodic basis? A. Every six months.

Q. Was there a particular month that was part of the practice or what time was a totem pole due? A. The raises were, I would say, effective the 1st of May and 1st of November, so the totem poles were made up a month or six weeks prior to that time.

Q. Had this been done as long as you had been in McDonnell? A. Yes. As far as I know.

[458] Q. What was the primary purpose of the totem pole? A. To come up with a means or a guide for giving out the money raises.

Q. Was the decision made by one person or more than one? A. It was a combination of many people's inputs.

Q. Who? A. Myself, the lead technicians who, technicians who were working directly for the other lab supervisors or assistant supervisors, Mr. Sinecki's comments on what he knew of the technicians, the engineers whom the technicians were working for or the engineers who knew what the technicians could do.

Q. How was the totem pole used in determining who would be declared surplus and who would not? A. It was used as a guide to come up with a list of people. Now you did not just start at the bottom and say, OK, we need eighteen names, we will just go one, two, three, up from the bottom. It was used as a guide and we started at the bottom and tried to stay at the lower end of the totem pole, because by their position at the top of the totem pole

they were the best people. We definitely didn't want to start at the top and say, OK, we will take the top sixteen. What the totem pole shows is the man on the top is the best one we have got as far as the company is concerned. The man on the bottom is the least desirable one for the company.

[459] Q. What other factors did you consider in addition to the totem pole? A. It mainly was job assignments, their attitude toward their work, their cooperation with the engineers and other technicians, their knowledge of procedures, and their technical knowledge, just their general over-all performance.

Q. Would the particular job assignments that a man had when the excess list was made up, have anything to do with whether he was declared excess? A. Yes.

Q. What about a man's potential as judged by you and the other supervisors? A. This also plays a part in compiling a list of surplus people.

Q. After these eighteen men were declared excess, was a test offered to them? A. Yes.

Q. Did it ever come to your attention that any of them refused to take the test? A. Yes.

Q. Who? A. Mr. Green.

Q. What was the purpose of that test, if you know? A. What I was told was that——

[460] Q. (Interrupting) Just from your own knowledge, not what other people told you. A. From my own knowledge I don't know what the test was for.

Q. All right. Was Mr. Green subsequently laid off? A. Yes.

Q. In connection with that layoff did you have a conversation with him? A. Yes.

Q. What did he say and what did you say? A. When he was, I will say, informed of the pending layoff, he

approached me and said that he wanted a meeting with Mr. Peck, who at that time was the electronic equipment division manager, at least that is my recollection that he was the top dog in E.E.D. I told Percy, I says, well for what reason, or something of that nature. Percy says, well, I think I am a special case. I says, OK, I says, I will talk to Sinecki and see if this can be arranged. At that time or shortly thereafter I told Sinecki that Percy wants to talk to Mr. Peck. So Ed called someone and told him that Percy wanted to talk to Mr. Peck. I don't know whether there ever was a meeting of Mr. Peck and Percy or not. But this is what I had to do when Percy found out about the layoff or was made aware of the layoff.

[461] Q. This was the extent of your conversation with him? A. I imagine there were a few more words said, but essentially that is it. That was the conversation.

Q. Did you ever have any other meetings with Mr. Green after that last conversation when he was laid off? Did you see him any more? A. No.

Q. Mr. Godefroid, you were Mr. Green's supervisor for about a year, were you not? A. Yes.

Q. As his supervisor, did it ever come to your attention from anybody in your official capacity, excepting Mr. Green, that Mr. Green was discriminated against because of his race or his participation in civil rights activities?

Mr. Gilden: Your Honor, I am going to object. That is hearsay against this plaintiff. Any conversation he might have with anybody else would not be binding on the plaintiff.

Mr. Foote: Your Honor, this would come under a clear and long-recognized exception to the hearsay rule, which is a statement made to a man in a particular capacity when the capacity itself is in issue and the statement on which he acted. I have got a number of cases I can give

the Court if it wishes. I also have a citation from Wigmore supporting this question. I will be glad to supply the Court with them if you want.

[462] Mr. Gilden: Your Honor, the nature of the substance of this lawsuit is discrimination. Anything he heard from anybody else would be strictly a self-serving statement that wouldn't reinforce or help this Court to any extent. It is a question of what the evidence is in this particular lawsuit that is relevant, nothing else.

Mr. Foote: I agree that that is the question, what is relevant and nothing else. I disagree with what you think is relevant. The question is whether this man and the other supervisors and the other people in authority speaking for McDonnell discriminated and what they did and how they acted toward Mr. Green. And the exception clearly applies, because if he was informed that there was discrimination out there, it could have explained his actions. It could have shown that in fact he was discriminating by not investigating. There are a number of ways it could have affected his action, and it is absolutely admissible and a clear exception to the hearsay rule.

Mr. Gilden: Your Honor, this opens up a whole Pandora's Box. If you permit the testimony in here this morning, I can't cross-examine these people about what they did or didn't do. You are getting a blanket statement from this witness as to whether there was or was not, and that is not relevant. I can't have the right to cross-examine and find out what these people did, what their relationship was with Percy [463] Green, what transactions they had with him. I should have a right to go into what they actually said, what they actually did, and this Court can determine whether there was discrimination. It is strictly a self-serving statement that has no validity in this lawsuit.

Mr. Foote: Your Honor, that raises another reason why this is clearly an exception to the hearsay rule. This question is not to get from this witness testimony which is submitted as assertive facts. What he says other people told him in his capacity is not presented to establish that it happened. We make no claim that what he says he was told is true or false. The reason for this testimony, and that is why there is no reason to cross-examine, we are not asserting that if we were told he was discriminated against that for that reason he was discriminated against, we are not asserting it. The reason it is relevant and the reason it is an exception is that it tends to explain how this supervisor acted as to this man in his official capacity and how he performed the duty of that capacity that is at issue in this case.

Mr. Gilden: Oh, Your Honor, now I am really confused.

Mr. Foote: Let me get some cases. Let's just get to the law and quit arguing about it.

The Court: Let's take a recess and the lawyers can come into my chambers.

[464] (Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

The Court: Gentlemen, based on the citations which were furnished to me, this testimony is admissible, not to prove the truth or falseness of what he may have received in the way of information but to show his state of mind and for no other purpose. Proceed.

Mr. Foote: May we have the question read?

(Thereupon, the question was read by the reporter as follows:

Q. "As his supervisor, did it ever come to your attention from anybody in your official capacity, excepting Mr.

Green, that Mr. Green was discriminated against because of his race or his participation in civil rights activities?")

A. No.

Q. (By Mr. Foote) To the best of your knowledge, Mr. Godefroid, was Percy Green treated any differently from any other lab technician B in Department 958 in regard to the following considerations: job assignments? A. No.

Q. Promotion consideration? A. No.

[465] Q. Ranking on the totem pole? A. No.

Q. The orientation procedure with the exception that you have explained because of his particular background? A. No.

Q. Pay? A. No.

Q. Working conditions? A. No.

Q. The layoff? A. No.

Mr. Foote: No further questions, Your Honor.

The Court: Cross-examine.

Mr. Foote: Your Honor, I have been reminded of one more question, may I ask a question?

The Court: Yes.

Q. (By Mr. Foote) In your opinion was Mr. Green qualified to be a lab technician A? A. Yes.

Q. What was the normal—Your answer was yes? A. Yes.

Q. What was the normal tenure in the department before someone who had come in as a B was made an A? A. I don't think there was any normal tenure, it was just [466] a matter of what wage he was hired at and I would say though that no one with less than one year or eighteen months or in other words who had passed two or three reviews before he was made, promoted from tech B to A or from A to development tech. It just wasn't done

after six months of work or one year of work. It wasn't anything that was automatic. I think in general it involved at least three or four six-month periods before he was to the point where we felt that we should promote him so that he would not be kept at the top of the pay scale for a B technician or an A technician.

Mr. Foote: No further questions, Your Honor.

Cross-Examination, by Mr. Gilden

Q. Mr. Godefroid, where were you born? A. St. Louis County, Brentwood, Missouri.

Q. Brentwood, Missouri? A. Yes, sir.

Q. How long have you lived in the Metropolitan St. Louis area? A. My entire life of thirty-six years with the exception of three years I spent in El Paso, Texas.

Q. What years were they? A. '53 through '56.

Q. Where did you go to school? A. At Valley Park, at Sacred Heart School at Valley Park, [467] and the Valley Park High School, public high school.

Q. Were any of these schools integrated? A. No.

Q. Did you ever live in a black community? A. No.

Q. Was Percy Green the first black man you ever worked with? A. No, sir.

Q. What black men did you work with before that? A. Quite a few in the Army.

Q. What years was that? A. '53 through '56.

Q. What work did you do in the Army with black men? A. I was instructor—well, I was associated with a black man or colored man, I think I was going to school at that time down at El Paso.

Q. You were in the same class? A. Same class.

Q. That was in the Army? A. Yes, sir.

Q. Was Percy Green the first man you ever worked with in private employment that was black? A. No.

Q. Where did you have a black man prior to Percy Green in [468] private employment? A. In 958.

Q. What year was that? A. '62-'63.

Q. Who was that? A. Earl Browder.

Q. Was he a lab technician? A. He was a lab technician.

Q. Was he an A or a B? A. He was not classified as A or B, he was outside engineering personnel.

Q. He wasn't employed by McDonnell-Douglas then? A. He was in the employ of Pollak & Skan, which was an engineering organization that supplies temporary personnel to various companies.

Q. I see. A. He worked in the lab with about, I think, fifteen other job technicians.

Q. Well, actually then, McDonnell really farmed out some of this work by bringing certain men in, is that right? A. Right.

Q. They actually weren't on the McDonnell payrolls, is that correct? A. Well, they were not paid with McDonnell checks.

[469] Q. Is that correct? A. Yes.

Q. All right. Now you have testified that Percy Green was qualified as a lab technician A, is that correct? A. Yes.

Q. Lab technician A was higher than lab technician B? A. Yes.

Q. On the scale, is that correct? A. Yes.

Q. It also meant more money? A. Yes.

Q. Work that was being performed by lab technicians A was more complicated and sophisticated and needed more talent than the people in lab technician B? A. Not necessarily.

Q. You mean they were actually doing the same work as lab technicians B? A. The technicians, as far as their classification, whether they be A, B, development tech or senior development tech, were doing the work that was required to be done in the department. There was no union there and we did not say, OK, all you can do is solder wires; all you can do is check cards; all you can do is design breadboards. I mean tech A's, tech B's, development techs, they all essentially did whatever work [470] was required.

Q. Well, give me some of the types of work that Lab technicians A were doing during the year 1963, late '63, and during the year '64? A. The same type of work Percy was doing.

Q. They were making wire bundles? A. Wire bundles and checking out units and ringing out units.

Q. What was the difference, then? A. The pay.

Q. The pay was the only difference? A. Essentially.

Q. And there was no more sophisticated equipment that they had to work on that lab technicians B were not qualified to work on? A. I am saying that the job description for an A calls for a few minor additional requirements as opposed to a tech B. I am saying that the work that the tech A's were doing was no more sophisticated than the work that tech B's were doing.

Q. Now the lab technicians B, how many black men were there during the time that Percy Green worked there? A. In 1958 there was one.

Q. And that was Percy Green? A. Right.

[471] Q. How many black men were there in the classification of lab technician A? A. I don't know.

Q. You mean--Weren't you supervisor of these people? A. Of the lab technicians A in the Department 958 there were none.

Q. I am talking—— A. (Interrupting) There were no black ones.

Q. I am just referring to 958, sir, just the ones you know about? A. None.

Q. Now how many black technicians were there of any type during this period? A. None other than these ones from Pollak & Skan.

Q. From this private industry, this other company that may have brought some—this other man in. You said there was one other man? A. There was more than one. I recall Earl Browder because he was a fine technician.

Q. All right. Now how many—in this department how many engineers were black? A. I don't know.

Q. Well, you worked with engineers, did you not? A. Yes.

[472] Q. All right. Of the engineers you worked with how many were black? A. I didn't count them. I mean there may have been half a dozen. I would say half a dozen.

Q. How many engineers were assigned to Department 958? A. None were assigned to 958, the technician group. They were in another department.

Q. Well, there was a category of engineer support, isn't there, that Mr. Green, you stated, marked on his sheet that he was—— A. (Interrupting) Yes.

Q. That is the kind of work he was doing? A. Yes.

Q. Would that be supportive work for engineers? A. Supporting work for engineers.

Q. (Interrupting) All right, so there—— A. (Continuing) ——out of 958, but it was 956, 954 or 953.

Q. That was the work Mr. Green was doing in 958, wasn't it? A. Right.

Q. So therefore there were certain engineers' support that he was performing? A. Yes.

[473] Q. So therefore there would be some man for whom this work was being done, is that correct? A. Yes.

Q. All right, was that man white or black? A. There was some white ones and some black ones but none of them were in 958.

Q. Where were these engineers located? A. In 956.

Q. All right. What department was that known as? A. Simulators and trainers or something of this kind.

Q. All right. I am not trying to confuse you, Mr. Godefroid, but you said that what went into making up this totem pole was advice of certain individuals as well as talent, is that correct? A. Yes.

Q. All right. Now, you were one of the people that made a decision here, is that correct? A. Yes.

Q. And Mr. Sinecki was one of the people, right? A. Yes.

Q. Give me the names of some of the other people that made up this totem pole in April of 1964. A. Bill Holzhauser.

Q. Is he white or black? [474] A. White.

Q. All right, who else? A. Gene Richardson.

Q. All right, is he white or black? A. White.

Q. Who else? A. Pete Droste.

Q. Is he white or black? A. White.

Q. Who else? A. Engineers I can't recall their names, John Hanlon.

Q. Was he white or black? A. White.

Q. Who else? A. Other engineers I don't recall their names.

Q. Were they white or black? A. I don't recall whether there was a black one there or not.

Q. Could it very well be true that none of these people were black that made this decision, is that correct? A. It could very well be true.

Q. All right. Now, really, you had a lot of judgment to make here, right? A. Yes, sir.

[475] Q. I mean a man's right to work or not to work was placed in jeopardy by this totem pole? A. Not at the time the totem pole was established. I mean we——

Q. (Interrupting) But—I mean you did know later on, did you not, that there were going to be people that would be declared surplus, is that right? A. Not as a fact, no.

Q. You never found out they were going to be surplused? individuals? A. In early '64 we could look ahead and see that in June, July, August, things were tapering off. If we don't get more work we are going to be short people. Now all these manpower forecasts say the same thing, that within eight months or sixteen months there is a slack-off; but there are always new jobs coming in, and the slack-off always keeps moving out and it is eight to sixteen months away.

Q. As I recall your testimony, Mr. Godefroid, I think you met with Mr. Sinecki and Mr. Green and you warned him about that? A. Yes.

Q. That he might be laid off, isn't that right? A. Yes.

Q. So being on the bottom of the totem pole your likelihood of being laid off is stronger than being on top? [476] A. Right.

Q. All right, that is all I wanted to know. So therefore he faced that possibility by his position on that totem pole? A. OK.

Q. Did you know Mr. Gaffney? A. Yes.

Q. Do you know him now? A. No better than I know all the other technicians that were working in the lab.

Q. Did you know that Mr. Gaffney was kept on? A. From the evidence that has been submitted, the list of names and things of this nature with the various notes on it, yes.

Q. Did you know that Mr. Gaffney's name was under Mr. Green's name on your totem pole? A. By looking at the totem pole, yes.

Q. All right, did you know that he had flunked the exam? A. No, sir.

Q. The first time you found out was when we brought it out in court here? A. I don't think it was brought out. I mean I heard it this morning or yesterday afternoon; I don't know whether it was brought out in court.

Mr. Foote: Your Honor, may I ask when he questions the [477] witness about the totem pole he give him the totem pole?

Mr. Gilden: Oh, yes, that's OK. I will give him mine (handing the witness the document).

Q. (By Mr. Gilden) Sir, I made a mistake on that, I said Gaffney, I meant Mr. Graville. Do you see Mr. Graville's name? A. Yes.

Q. Is his name below Mr. Green's? A. Yes.

Q. Is that the one you heard about who failed the examination? A. Yes.

Q. All right. Do you know what Mr. Graville is doing at the present time? A. No.

Q. Do you know Mr. Jeffress? A. Yes.

Q. When did you first know him? A. That is hard to say. I don't really recall when I first met him.

Q. Was that before Mr. Green went into the department or afterward that you first became acquainted with him? A. I couldn't say.

Q. Do you know what happened to him? [478] A. He transferred in from production.

Q. Would that be the same department that Mr. Green transferred into, from production into the lab technician section? A. I don't really know.

Q. You don't know where Mr. Green came from? A. I know from the testimony that Mr. Green came from 966, and I know for a fact that is where he was working when he transferred, yes.

Q. Is that where Mr. Jeffress came from, 966? A. I don't know where Mr. Jeffress came from.

Q. What? A. I don't know where Mr. Jeffress came from.

Q. All right. Now did Mr. Jeffress work in your department under your supervision? A. Indirectly.

Q. You saw him about? A. I think we need some clarification.

Q. That's all right, go ahead. A. The Gemini Mission Simulator was being built in Building 1 at McDonnell. The rest of E.E.D. essentially was down in either Building 102 or they moved, I think, in the early part of '64 or 5 over to Building 101. Now these people down there, Sinecki was down there, Gene Richardson was down [479] there, who was an assistant supervisor, and Pete Droste was down there, who was an assistant supervisor. Richardson and Droste and both Holzhauser, who was over in Building 1 on the simulator, all three reported to me. But being as they were so, Richardson and Droste was somewhat remotely located from my normal desk they, I would say, reported more to Sinecki than Holzhauser's men did. So a lot of people came in down there. There were some people hired in there by Sinecki or Richardson, and there were a lot of people who reported to me that I didn't actually interview.

Q. I am just trying to find out what you know. Do you know Mr. Jeffress to be a lab technician? A. Yes.

Q. All right. Do you know whether he was a B or an A? A. No.

Q. Do you know when he transferred out of the department? A. Sometime in '66 or '67.

Q. Did you ever encourage him to go into the lab section area? A. No, I never talked to him prior to his transfer.

Q. Did you know Mr. Lowe? A. By looking at the records, I find a little informal memo concerning Dave Lowe. I do not recall who he was or what was said between him, all I seen in the record was that he had [480] requested a transfer and I made some note on a memo saying he didn't want a transfer at this time.

Q. Now I think you testified that you met with Mr. Sinecki and Mr. Green at the time that he requested the opportunity to move into the lab section area, is that correct? A. Right.

Q. How was Mr. Green dressed at that particular time? A. Essentially the same as he is dressed now.

Q. Did he have a beard at that time? A. I wouldn't swear to it, I think he did.

Q. Did you make comment to him about his beard? A. No, sir.

Q. Didn't you tell Mr. Robertson that you had discussed Mr. Green's beard during this interview? A. I may have.

Q. Well, did you or did you not? A. I don't recall.

Q. Do you know whether his beard interfered with his duties in production or in the lab section? A. It did not.

Q. All right. Do you know whether the way he was dressed interfered with his duties and employment at McDonnell Aircraft Corporation because of the way he was dressed in any way? A. It did not.

[481] Q. OK. Did you have a prepared standard of dress that was given to all employees at that time, published? A. No published standard of dress.

Q. Do you have one today? A. No, sir.

Q. Do you tell people how to dress today? A. No, sir.

Mr. Foote: For clarification, do you mean in his present job in a different company?

Mr. Gilden: Yes, certainly. Certainly.

Mr. Foote: Or in 958?

Mr. Gilden: He is not in 958 so therefore he couldn't testify to that.

Q. (By Mr. Gilden) Did you know that Mr. Green had climbed the Arch? A. I am sure I was aware of it.

Q. Do you know when you received that information? A. Probably read it in the paper the day after it happened.

Q. All right. Did you also know he was engaged in other civil rights protests in the St. Louis area? A. The only information I have is what I read in the papers.

Q. Did you read about it in the paper? [482] A. I probably did.

Q. At the time that you prepared this totem pole did you know that Mr. Green had been engaged in civil rights protests, demonstrations in the St. Louis area? A. I guess I did. If he had been engaged in them prior to that time.

Q. Do you know when you received the information from higher-ups about the issue of layoffs, I mean the last issue when Mr. Green was told he was going to be laid off, not the earlier one? A. Shortly before the test was given.

Q. When would that have been? A. Early August of '63 or 4. '64.

Q. '64? A. Yes.

Q. Do you know when that test was administered? A. Not the exact date.

Q. Approximately? A. The middle of August.

Q. Did you ever have occasion to talk to Mr. Green about transfer to Cape Kennedy or Cape Canaveral? A. No, sir.

Q. Do you know anybody who did? A. Only from what I have read, I think it is in evidence [483] in here somewhere, I have read memos associated with it.

Q. Were these memos submitted to you as supervisor? A. No, sir.

Q. These are memos that you have read before you came into court today? A. Yes, sir.

Q. Did you in fact have some men who were listed on that totem pole who were in fact at that time in Cape Kennedy or Cape Canaveral? A. Yes, sir.

Q. Were they actually surplused because of their position in Cape Kennedy or Cape Canaveral? A. Repeat the question.

Q. Were they declared as surplus? A. No, sir.

Q. Why weren't they declared as surplus? A. Because they were at Cape Kennedy or in Houston.

Q. If Mr. Green were actually at Cape Kennedy or in Houston would he have been declared as surplus? A. No, sir.

Q. Isn't it a fact, Mr. Godefroid, that you didn't want Mr. Green to come into your section? A. No, sir.

Q. That is not true? [484] A. No, sir.

Q. And that you tried to dissuade him because you didn't want him to come in? A. No, sir.

Q. That is not a fact? A. No, sir.

Q. Isn't it a fact that Mr. Sinecki didn't want him either because he was black and wore a beard and dressed the way he did? A. I don't know what Mr. Sinecki wanted

Q. Mr. Sinecki never told you that? A. No, sir.

Q. Isn't it a fact that you didn't want him in there because he was a civil rights protester? A. No, sir.

Q. Did Mr. Sinecki ever tell you that he didn't want him in the department because he was a civil rights protester? A. No, sir.

Q. Now you said and testified to these fourteen or fifteen weekly sheets, is that correct? A. Yes, sir.

Q. Where Mr. Green noted what work he had performed during the week. You have already testified to that? A. Yes, sir.

[485] Q. You were here when Mr. Sinecki testified, were you not? A. Yes, sir.

Q. Do you know how long Mr. Green was in your department? A. Roughly a year.

Q. So therefore there would be some forty of these sheets missing, is that correct? A. What have you got, seventeen?

Q. I think there are fifteen. A. Fifteen? There are fifty-two weeks, some forty, thirty-five or forty are missing.

Q. Thereabouts? All right. I will say thirty sheets, then. A. OK.

Q. Do you know what happened to them? A. They were probably thrown away with the rest of the records, the technicians' utilization sheets.

Q. How often do you throw these sheets away? A. I would say they are kept for a minimum of a year's time, depending if we have got a general clean-up and we decide, well, we don't need these records, we will throw these away. There is no set standard time for keeping this type of record.

Q. Were you told by management to prepare a report of your dealings with Mr. Green? [486] A. Who do you consider management?

Q. Any superior? A. I was told by Mr. Sinecki.

Q. By Mr. Sinecki? A. After this layoff came up he said come up with somthing that would kind of, oh, review what you remember. When this investigation gets started then you won't have to rely entirely on memory of things that happened months ago.

Q. Wasn't the purpose really to justify the layoff? A. No, sir.

Q. It was not, Mr. Godefroid? So the company could get together all of the facts and materials they needed in order to justify Mr. Green's layoff? A. No, sir.

Q. That wasn't told to you? A. No, sir.

Q. Were you told to do that for any of the other people that were laid off at that particular time? A. Not at that particular time.

Q. Did you ever supply any data to the company with respect to the layoffs of the other men? A. Not those men.

Q. Not those men? A. No, sir.

[487] Q. Percy Green was the only one you supplied data to the company, is that correct? A. No, sir.

Q. At that time? A. At that time, yes, sir.

Q. Among the group that were laid off he was the only one you supplied the company information about? A. I supplied information on other technicians. I would say not as detailed or complete a record.

Q. Do you know which technicians you supplied data on, Mr. Godefroid? A. I supplied data on all of those who were declared surplus, as to what they were doing, the jobs they were assigned to.

Q. How long a document did you supply to the company on the other men? A. It may have been just a roster with some notes alongside the names of these people.

Q. That is all it was? A. I don't know.

Q. How many pages did you supply to management on Percy Green? A. Two or three pages.

Q. Did you also go out and get statements from the [488] engineers on Percy Green? A. I don't know whether I went out and requested statements from the engineers or not.

Q. You remember Mr. Brenner, don't you? A. Only from reviewing that exhibit.

Q. You already testified about Mr. Hammond, the senior group engineer, you remember him? A. Yes.

Q. Did you go over and see him about getting a statement? A. No, sir, not that I recall.

Q. How about Mr. Gherardini? A. No, sir.

Q. You don't recall that? A. Not that I recall.

Q. Do you know the purpose of submitting this statement at that time?

Mr. Foote: I think he has answered that, Your Honor. He can answer it again but I think he has answered it.

The Court: He can answer it if he knows.

The Witness: They wanted to know the background on Percy.

Q. (By Mr. Gilden) Well, was he unusual in any way? A. What do you mean, unusual?

Q. Why was he treated differently than the other employees [489] on these work-ups? A. Because he, of his own admission, said he was a special case.

Q. So company treated him—— A. (Continuing) He wanted to see Mr. Peck. The other technicians that got laid off, they didn't. I'm sorry to see you go, and they left.

Q. Did Mr. Green state to you that he was going to make any claim of racial prejudice at the time of his lay-

off? A. I was aware of it. I don't know whether he personally told me or whether I got it from someone else. It was to the effect that he was going to write to all the various Equal Opportunity Commissions filing a complaint.

Q. Who else did you talk to in management besides Mr. Sinecki about Mr. Green and his qualifications at that time? And I am talking about the period of July and August 1964. A. Well, I don't recall anyone, possibly Dave Birge.

Q. What was Mr. Birge's title at that time? A. I think he was the director—not director of personnel—Personnel Manager, or something, for E.E.D.

Q. Did you know Mr. Green's seniority at that time, Mr. Godefroid? A. I knew he had been in the employ of McDonnell since about '56, essentially the same time I have.

[490] Q. Did he have one of the lowest badge numbers of all the men who were being laid off? A. I don't know that we compared badge numbers. I wouldn't say for a fact that he had one of the lowest numbers. He probably had one of the lowest, yes, because all of these people were relatively new people.

Q. I will give you what has been marked Exhibit 33, tab 17. Will you look at this totem pole and you tell me who is the highest rated person on that totem pole to be laid off other than the one lab technician A you talked about? I am talking about lab technician B. A. I don't know if this is the same as the other list or not.

Q. I will give you the other one (handing document to the witness). A. Other than the tech A, Percy Green was the highest man on the totem pole to be laid off.

Q. And the only black man on the totem pole? A. The only black one on there.

Q. You had reviewed, of course, all of these men at the time that you prepared this totem pole, their qualifications? A. Yes.

Q. You look at Mr. Green's name and then go up to Lersch and tell me who had more seniority at McDonnell Aircraft [491] at that time? A. I can't say.

Q. You don't know? A. No, sir.

Q. You don't know who had more experience in the work that was being performed? A. Not from this piece of paper.

Q. You can't tell? A. No, sir.

Q. Do you have anything that would show who had more experience and more seniority?

Mr. Foote: Which question do you want to ask him, more experience or more seniority?

Mr. Gilden: Either one.

A. I personally have nothing that shows what experience they have had and nothing that shows which one has more seniority.

Q. Do you remember Mr. Lersch? A. I remember Mr. Lersch.

Q. Did Mr. Lersch have to take an examination? A. What examination?

Q. The test you are talking about that was given in August 1964? A. No, sir.

[492] Q. Did Mr. Richardson have to take an examination? A. No, sir.

Q. Was Mr. Lersch lab technician B? A. Yes, sir.

Q. Did Mr. Richardson have to take the examination? A. No, sir.

Q. Did Mr. Urzi have to take it? A. No, sir.

Q. Did Mr. Gaffney have to take it? A. I assume he did.

Q. Did Mr. Kenney have to take it? A. No, sir.

Q. The first man, then, other than Mr. Gaffney who was transferred to take the examination then was Percy Green, right? A. Yes, sir.

Q. He was the head of the list on the examination?

Mr. Foote: I don't understand your question.

The Witness: So——

Mr. Foote: Wait until we have a ruling, please.

The Court: Let me see the totem pole. I don't know what you are talking about.

Q. (By Mr. Gilden) The people I am referring to are the people above his name.

[493] The Witness: The tech B's?

Mr. Gilden: Yes. I am only referring to the technicians. I think it starts at the level here of Mr. Lersch's name.

The Court: Is this list you are handing me, which is tab——

Mr. Gilden: 17.

The Court: 17, were all of these declared surplus, all of these lab technicians?

Mr. Gilden: No, I don't think all were.

The Court: This is just their standing?

Mr. Gilden: On the totem pole.

The Court: What is that totem pole over there?

Mr. Gilden: I don't know.

Mr. Foote: That is the same ranking, that is the same list as this but from somebody else's file. This has notations on it in handwriting. They are both taken from the totem pole. As I understand, the totem pole itself is a great big document, this big, on graph paper. Is that right?

The Witness: Right.

Mr. Foote: We don't have that here. These are some listings.

The Court: Are the names written through here, are these the ones that were declared surplus?

[494] Mr. Foote: Yes, sir.

The Court: On the totem pole?

Mr. Foote: Yes, on the totem pole. The ones where there is a line drawn through and some notation with layoff or transfer or whatever. There are some eighteen names. These are the ones who were declared surplus, is that right?

The Witness: Right.

The Court: OK, you may have it.

Mr. Gilden: Will you read the question?

(Question read by the reporter as follows:

Q. "He was the head of the list on the examination?")

Mr. Foote: I'm sorry, I don't understand the question.

Mr. Gilden: I will rephrase it.

Q. (By Mr. Gilden) Was Percy Green the top person on the totem pole to take the examination? A. With the exception of Havermann.

Q. Except for Havermann, the lab technician? A. The one that is scratched out there above him.

Q. I will give it to you so that you can refresh your memory. A. OK. You are with tech B's, right?

Q. That's right. Just tech B. A. Not A's?

[495] Q. Not tech A's, just B's. A. Green was the top of the list of the ones that were declared surplus with the exception of Gaffney.

Q. And he was transferred to another department? A. He was transferred.

Q. So actually, Gaffney did find employment elsewhere, is that correct? A. Yes.

Q. Within the company? A. Yes.

Q. Then Green would be the top of the list to be declared surplus and the top of the list to take the examination? A. Gaffney took the exam also.

Mr. Foote: Of whom?

Mr. Gilden: Lab technicians B.

The Court: How about the A's, did the A's take the examination?

The Witness: Yes.

The Court: Sir?

The Witness: The ones that are marked on here did.

The Court: They took the examination?

The Witness: The whole group of whatever there were, fourteen or eighteen technicians.

Q. (By Mr. Gilden) How many lab technicians A were [496] declared surplus? A. Five.

Q. I thought there was just one that was laid off? A. There was just one laid off.

Q. There was just one laid off? A. Right.

Q. That was Havermann, was it not? A. Right.

Q. The other four were retained, were they not, the lab technicians A? A. Three were retained and one resigned in September.

Q. I see. A. He counted as a surplus even though he wasn't gone yet on the 28th. He put in his resignation.

Q. There was really only one lab technician actually left in August 1964, that was Havermann? A. Right.

Q. Did you ever see that test, Mr. Godefroid? A. No, sir.

Q. You wouldn't know whether that test had any relationship to the work that was being performed or not, would you? A. No, sir.

Mr. Foote: It is a little late to object, but was that for the work that was being performed in the department or [497] a test that was designed to determine what a man was qualified to do? Did you understand the question?

The Court: He doesn't know the test.

Mr. Gilden: It doesn't make any difference anyway.

Q. (By Mr. Gilden) Mr. Godefroid, what is your personal feelings on civil rights protest demonstrations? A. I don't think I personally am concerned one way or the other. I mean I feel that they have their cause to fight for and I just—I wouldn't become involved with it.

Q. You mean you don't have any feelings about it one way or the other? A. Right.

Q. Are you prejudiced against black people? A. No, sir.

Q. You have no prejudices whatsoever? A. No, sir.

Q. I believe you heard the testimony, did you not, yesterday, I think it was asked on cross-examination, I will ask you the same question. Do you know whether Mr. Green—Strike that. Did you place a clipping of Mr. Green's climbing of the Arch into his pay envelope? A. No, sir.

Q. Do you know who did? A. No, sir.

[498] Q. Now isn't it a fact, Mr. Godefroid, that the decision for layoff came one day after Mr. Green had climbed the Arch? A. No, sir.

Q. It did not? A. No, sir.

Q. How long after he climbed the Arch? A. I would say I was first aware that we had to declare surplus technicians the first or middle of August.

Q. 1964? A. Of 1964.

Q. Do you know when Mr. Green climbed the Arch? A. No, sir.

Q. Was it earlier than that date? A. I really wouldn't swear one way or the other. I think it was while he was in the employ of 958 so it must have been earlier than August.

Q. Did he miss any time from work because of climbing the Arch? A. I don't know.

Q. Do you know whether he ever missed any time from work because of any of his civil rights activities? A. No, I don't know.

Q. You have testified that Mr. Green wasn't performing any menial duties around this section, is that correct? [499] A. Yes.

Q. Did you, on any occasion, ever give him a wire bundle to work on? A. Yes.

Q. Did you purposefully set it up so that it had some errors in it? A. No, sir.

Q. So that you would see whether or not he was performing his work properly? A. No, sir.

Q. What was the purpose of giving him the prepared wire bundle? A. I didn't give him a prepared wired bundle.

Q. You didn't? A. No, sir.

Q. You told him the thing wasn't working and let him see if he could find the mistake? A. No, sir.

Q. You don't recall that at all? A. No, sir.

Q. You never did that on any occasion? A. No, sir.

Q. Do you recall Mr. Green's first days in your section? A. Yes, sir.

[500] Q. Did you on that occasion give him a wire bundle that had been partly worked by another lab technician? A. I gave him a chassis that had been partly wired by production personnel.

Q. What was the purpose of doing that? A. I told him to complete the wiring or to incorporate changes that had come out into the chassis.

Q. Did you know that there had been errors in preparation of that partly worked wire bundle? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Wasn't it a fact that there were errors in that wire bundle? A. It is a fact that the chassis wiring was pretty well fouled up, that's right.

Q. It was pretty well fouled up? A. Right.

Q. Mr. Green had to start from scratch and build up a new wire bundle? A. Right.

Q. Is that correct? A. Right.

Q. Isn't it a fact, Mr. Godefroid, that the totem pole [501] could be used as a method of layoff? A. It could be.

Q. OK. Now you testified that Mr. Richardson, who is one of the people, I believe you stated he was in position of making determination on the totem pole? A. Right.

Q. Is that a different Mr. Richardson from the Mr. Richardson that is listed on the totem pole? A. Yes.

Q. What is the name of the fellow who is on the totem pole? A. John Richardson. On the totem pole is Malla Richardson. The other Richardson is John Richardson.

Q. Now do you know Mr. Moehlenkamp? A. Yes.

Q. Did you ever discuss with him the placement of names on the totem pole? A. Not that I specifically recall.

Q. Is it possible that you discussed it with him? A. Yes. I very likely did.

Q. What was Mr. Moehlenkamp's position at that time? A. I doubt if he even made any real comment. This totem pole, the initial one, when it is set up the engineers are invited in to review. Now we don't just invite all the [502] engineers in and say come on in and shuffle cards and get this thing the way you want it. We set the thing up. We get the group manager type engineer and ask him who he feels he should send to review the totem pole, to put their two cents' worth in for the technicians that were working for them. Then the engineers come in and look over the layout, and any comments they have are written comments. They do not change the position of the people on the totem pole. When they come in there, they come in and look at the positions and make any comments that they deem necessary and give them to myself and Mr. Sinecki. Then they are discussed between Mr. Sinecki and myself as to whether there is any merit to any of these comments. Now there are roughly a hundred technicians on this totem pole. A specific engineer may know ten of them, he may know five of them, he may only know one of them; so his, say, over-all evaluation of the totem pole, he cannot justly do it and he doesn't. He doesn't know what everybody else is doing. All he knows are the ones he knows. He can put in his say. If he feels, well Joe should have been above Henry because Joe and Henry both worked for me and Joe is the better man, this would be discussed. Now for him, maybe, Joe did a real fine job. Maybe he was doing something that he really enjoyed and he really put his whole effort into it. But maybe over-all Joe isn't as good as Henry, and myself and Sinecki would know this. And we would [503] have reasons for our assumptions and our placement on the totem pole.

Q. Did Mr. Moehlenkamp tell you that he believed Mr. Richardson to be below Mr. Green and should be placed below Mr. Green on the totem pole? A. He may have.

Q. And he thought Mr. Green was better qualified than Mr. Richardson, based upon the work he performed and his duties? A. Not that I recall.

Q. Now you have testified that Mr. Green was qualified for lab technician A, is that correct? A. Yes.

Q. Do you recall having a conversation with Mr. Green in which he requested to be placed in the classification of lab technician A? A. I vaguely recall something of this, yes.

Q. Do you know when that conversation took place? A. No, sir.

Q. Of course it would have been in this Department 958 while he was a lab technician B? A. Right.

Q. You don't know how long after he entered the department this conversation took place? A. No, sir.

[504] Q. Do you recall what you told Mr. Green when he made the request to be placed in this new category? A. I simply told him why tech A—I mean in the lab the classifications of technicians, I mean they all do essentially the same work. There is no union contract we have to follow and say one does this and one does that. I probably told him, well there is a good chance that in time you will be promoted to grade lab tech A, but right now I am sure we felt if we should have promoted him to grade A we would have promoted him to grade A.

Q. Did you tell him it would be better to take a pay increase at that time rather than a new classification and give him a promotion? A. I told him that well, most of the technicians tell me, give me the money, I am not worried about the promotion.

Q. I'm not asking you that; what did Mr. Green say to you? A. I don't recall.

Q. Did he say he wanted the classification? A. I don't recall.

Q. But you do know he was not made a lab technician A, that part you do know? A. Yes.

Mr. Foote: Are you through?

[504A] Mr. Foote: I have no questions, Your Honor.

The Court: Thank you, sir.

(Witness excused.)

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[505] **CHARLES L. WINDSOR**

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Foote

Mr. Foote: Will you mark these exhibits, please?

(Thereupon, the documents above referred to were marked by the reporter for identification as Defendant's Exhibits D and E, respectively.)

Q. (By Mr. Foote) What is your name, sir? A. Charles L. Windsor.

Q. Mr. Windsor, what is your position with the McDonnell Company? A. I am Director of Personnel Services corporate office.

Q. McDonnell-Douglas Company is the predecessor of McDonnell Aircraft Company, is that correct? A. Would you repeat that, please?

Q. Did I get it backward? McDonnell-Douglas Company is the successor of McDonnell Aircraft Company, is that right? A. McDonnell-Douglas Corporation is.

Q. Is the successor of McDonnell Aircraft? A. Yes.

Q. How long have you been with McDonnell, which refers to either one? [506] A. Approximately twenty-two years.

Q. What have you done for McDonnell during that period of time? A. I started off as the assistant to the Industrial Relations Director. After six months in that position I was made Employment Manager. Spent approximately thirteen years as employment manager. I was then promoted to Manager of Personnel Services for McDonnell Aircraft Company. I was in that position approximately nine years. And in July of 1969 I went into the corporate organization.

Q. What is your title now? A. Director of Personnel Services, Corporate Office.

Q. During 1963, 4 and 5, what was your title? A. I was Manager of Personnel Services for McDonnell Aircraft Company.

Q. To whom did you answer in the hierarchy? A. My superior was Robert C. Krone.

Q. To whom did he answer in the hierarchy? A. Well, at various times Dave Lewis or J. S. McDonnell, the chief operating officer, whoever he was at that time.

Q. Briefly, before you came to McDonnell what was your employment experience? A. Previous to that I had worked at Curtiss-Wright Corporation from 1939 to 1943.

[507] Q. In what capacity? A. I was section supervisor in personal services.

Q. And after that? A. I then went into the Marine Corps and spent two years in the Marine Corps in personnel type work.

Q. After that? A. From 1943 to 1945. I was very briefly in the general insurance business in '46 for approximately nine months. I then worked for a fee employment agency

for four months, and then went to work for the Presstite Engineering Company as personnel director, for approximately a year. After that McDonnell.

Q. Since 1939, with the exception of a brief period after the War that you described, have you been in personnel work up to today? A. Yes.

Mr. Foote: Your Honor, I think Mr. Gilden and I can stipulate that Defendant's Exhibits D and E, which are respectively the service record of Carl J. Havermann and the report of employee terminations indicating Carl J. Havermann, can be identified by this witness although he is not technically the keeper of the books and records. Is that correct?

Mr. Gilden: For identification purposes it will be agreed, Your Honor.

[508] Mr. Foote: For identification purposes.

The Court: Very well.

Mr. Gilden: I reserve the question of its admissibility.

Mr. Foote: Yes, I understand.

Q. (By Mr. Foote) I will hand you what has been marked Defendant's Exhibit D. It has been identified as the service record of Carl J. Havermann, and I will ask you what department Mr. Havermann worked in if you can tell from that record? A. This particular employee came to work——

Mr. Gilden: Your Honor, here I am going to object. I don't see where that would have any relevancy in this lawsuit.

The Court: What is the relevance?

Mr. Foote: Perhaps there is no need to go into this if we can stipulate that Mr. Havermann was senior to Mr. Green and he was declared surplus; not senior in time, I

don't know that, but he was declared surplus, and he was a lab tech A as opposed to lab tech B.

Mr. Gilden: That is already in evidence, Your Honor.

Mr. Foote: Then there should be no problem. I think it is certainly relevant. I thought your objection was relevancy. Do you want to just stipulate to put these records in?

Mr. Gilden: I am not going to stipulate but I would [509] say that has already been testified to.

Mr. Foote: I know.

Mr. Gilden: That Havermann was a lab technician A.

Mr. Foote: I know, this is on the same issue and it will take about two minutes and I think it is relevant.

The Court: Proceed.

Q. (By Mr. Foote) What department was he in from this record? A. He was hired into Department 958.

Q. When? A. April the 16th, 1962.

Q. In what classification? A. Lab tech A.

Q. Does that record indicate whether he is still a lab tech A? A. The record indicates that during his entire tenure he was a lab tech A.

Q. Does it indicate that he is still an employee of McDonnell-Douglas? A. No. It indicates he was terminated on August 28th, 1964.

Q. During the entire time he was employed, from that record, was he a lab tech A? A. He was.

[510] Q. I will hand you Defendant's Exhibit E, which has already been identified as a report of employee termination, with red lines bracketing the name Havermann, Carl J. What does that record indicate? A. This is a copy of the report of daily employment terminations. It indicates that Carl J. Havermann was laid off on August 28th, 1964.

Q. To your recollection is that the same day that Mr. Green was laid off? A. I believe so.

Mr. Foote: I will offer that into evidence at this time, Your Honor.

Mr. Gilden: I will object to them on the ground of relevancy.

Mr. Foote: On relevancy?

Mr. Gilden: Yes, not material.

The Court: They may be received.

Q. (By Mr. Foote) Do you know Percy Green? A. Yes, I do.

Q. Do you see him in the courtroom? A. Yes, I do.

Q. When did you first hear of Percy Green? A. To the best of my recollection the first I heard of Percy Green was when I received a phone call from Mr. David [511] Birge of the Electronics Equipment Division.

Q. When was that? A. In mid-August 1964.

Q. As a result of that phone call, what did you do? A. As a result of that phone call, I asked Mr. Birge to completely document everything that was going on down in that particular department and to give me some written reports on what the activities were all about.

Q. What reports did you have concerning Mr. Green during mid-August of 1964? A. Well, Mr. Birge reported to me that a layoff was——

Mr. Gilden: Your Honor, I will object to that as being hearsay.

The Court: Sustained.

Q. (By Mr. Foote) Did you ever meet Percy Green? A. Yes.

Q. When was that? A. I can recall two specific occasions where I had a meeting with Percy during the month of

August, 1964. There might have been an additional one I don't recall.

Q. When did the first take place as closely related to the layoff as you can place it? A. To the best of my recollection the first one was a meeting in the office of George Peck who was the general [512] manager of the division.

Q. When did it take place? A. I believe it was about a week prior to the actual layoff.

Q. When was this meeting set up, do you remember that? Was it the same day or earlier? A. I believe I set the meeting up with Mr. Peck a day prior to the actual meeting.

Q. And this was a week or so before the layoff? A. Yes.

Q. Who was at the meeting? A. Percy Green, George Peck and myself.

Q. What did you say and what did Mr. Green say? A. Generally, I listened.

Q. What did Mr. Green say? A. Mr. Green was asked by Mr. Peck what his problem was and what he wanted to talk about. To the best of my recollection, Mr. Green indicated that he felt that he was being discriminated against on the layoff, that it was unfair, that there were not enough black people in Department 958, that he was chairman of the Employment Committee of CORE and that he also felt that as a result of his having climbed the Arch that this was another factor in the discrimination against him.

Q. What did you say? Generally, what was the substance [513] of the conversation as you recall? A. Well, the general substance was, Mr. Peck listened to Mr. Green and I sat there as an observer more or less, and at the end of the conversation, after Mr. Green had brought up the Arch incident, I do recall asking him if he had ever been convicted or what the outcome of his arrest had been.

Q. You say Mr. Green mentioned the Arch incident? A. Yes.

Q. First? A. Yes.

Q. Was there any more of this conversation? A. That is the most I can remember about it right now. Other than Mr. Peck said he would review the matter and he explained what the layoff was all about and the need for it. If I recall correctly, he didn't think there was much he could do to help Mr. Green.

Q. This is what he said? A. Yes, sir.

Q. This surplus that you referred to, when was it first brought to your attention that there was declared a surplus of employees in Department 958? A. It was first brought to my attention when Mr. Birge called me regarding Mr. Green's problem.

Q. Without telling what Mr. Birge said, concerning the [514] surplus itself, that is the people who were scheduled to be laid off, was there any function that you and your office performed at that time? A. This is comparatively routine and set up in our corporate control procedures. Whenever there is a layoff the names of the people who are surplus are to be presented to the transfer department; the transfer department then has the responsibility to review all openings in the company to see if any of these people can be placed in other assignments throughout the company rather than laying them off.

Q. Was this done in the summer of 1964 concerning the surplus declared in Department 958 to the best of your knowledge? A. Yes, it was.

Q. I will hand you what is in evidence as Plaintiff's Exhibit 33, the documents behind tab No. 29, can you identify that document, sir? A. Yes, I can.

Q. What does the document show?

Mr. Gilden: Your Honor, the document speaks for itself.

Mr. Foote: Well, there are a list of—I will withdraw the question.

Q. (By Mr. Foote) There are a list of numbers 1 through 11. No. 1 says Jim Wayland for Engineering Research: currently needs technicians with experience in chemical/chemistry only. [515] Does that mean exactly what it says? A. I am sure it does. Could I explain this?

Q. Well, the legend on the top in the upper left-hand corner is to D. P. Waters from W. J. Garland. Does that indicate something to you that happened in your department? A. Yes.

Q. At the time you learned the surplus was declared? A. Mr. Garland was the administrator of the transfer section and reported to Mr. Waters, who was supervisor of Personnel Services. Mr. Waters reported to me.

Q. To the best of your knowledge were the various departments listed, 1 through 11, on this exhibit actually contacted in an effort to place the people declared surplus from 958? A. Yes.

Q. Are these departments listed in 11, Nos. 1 through 11, those paragraphs, to the best of your knowledge the departments that were actually contacted? A. Yes.

Q. In an effort to place these men?

Mr. Gilden: Your Honor, I am going to object to this. I didn't object to the last question. I don't know what you mean by to the best of your knowledge. If he knows, he can testify. If he doesn't know, he can testify. As to the best of your knowledge—either he knows whether they went out and [516] sought employment or whether they didn't do it, or whether this is some sort of documentary evidence that has been placed in the file which has no relevance.

Mr. Foote: Thank you, Mr. Gilden.

Q. (By Mr. Foote) With this clarification, what is your answer? A. I was told by Mr. Garland and Mr. Waters both that they had done this.

Mr. Gilden: I am going to object to that as being hearsay.

Mr. Foote: I think it was in response to his clarification.

Q. (By Mr. Foote) I withdraw the phrase to the best of your knowledge. Do you know whether your department contacted the departments listed in paragraphs 1 through 11 in that exhibit? A. I could not certify to it.

Q. Do you know how this document was prepared and by whom? A. It was prepared by William Garland.

Q. Is he still employed by McDonnell? A. He is not.

Q. Was it prepared in connection with the surplus or later?

Mr. Gilden: Your Honor, I am going to object to the [517] form of the question, it is leading and it suggests to this witness an answer. He can testify if he knows anything about the preparation of this document.

Mr. Foote: I will go back a little bit then. I think perhaps that objection is well taken. You see Plaintiff's Exhibit No. 33 here and you have heard testimony about it for several days now beginning with Mr. Robertson? A. Yes, sir.

Q. (By Mr. Foote) There are a number of documents in here and you heard Mr. Robertson testify that those documents, not all of them but the ones he mentioned, were provided by McDonnell-Douglas? A. Yes, sir.

Q. One of the documents that is in Plaintiff's Exhibit 33 is this document behind tab No. 29, which is the one I was just asking you about, is that right? A. Right.

Q. Was this document prepared to your personal knowledge as a result of any complaints that were filed or as a

result of any investigation that was made about Percy Green's layoff? A. I believe it was prepared at my request.

Q. Under your supervision? A. To a subordinate, and it was presented on the date of 3 September 1964.

[518] Q. Presented to whom? A. To Mr. Waters, who presented it to me.

Q. This was done on your order? A. Yes.

Q. And under your supervision? A. Yes.

Q. Under your control? A. Yes.

The Court: Mr. Foote, will your examination of this witness be rather lengthy?

Mr. Foote: I don't think so, Judge. I would say twenty minutes if I had to predict.

The Court: Let's take a short recess.

(Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Q. (By Mr. Foote) Mr. Windsor, there has been a lot of testimony about a test that was given. Was that part of the function of your department? A. Yes, it was.

Q. What was the test for? A. The test that has been referred to is a test——

Mr. Gilden: Your Honor, I am going to object to that. The best evidence would be the test itself.

[519] Mr. Foote: I think this witness can testify generally what the test was established to determine.

Mr. Gilden: I think the test speaks for itself, Your Honor. It has questions and answers. If the test were here we could determine. He could testify from it based on the questions and answers. I have no way of cross-examining him.

Mr. Foote: I think if the test were here the questions and answers probably—I am sure I would not understand them. I think in general he can testify to the purpose of the test.

Q. (By Mr. Foote) What was it supposed to determine, that is the question.

The Court: Well, Mr. Green didn't take the test, is that correct, Mr. Gilden?

Mr. Gilden: He did not take it.

The Court: Proceed.

Q. (By Mr. Foote) You can answer. A. The test referred to here is the test which we have been using to consider applicants for the classification of mechanic electric and electronic in our production organization.

Q. In the scale at McDonnell at the time, the scale of jobs, was mechanic electric and electronic an advancement higher up from a lab tech B? A. I would say yes.

Q. Did it require different skills? [520] A. Yes. It was one of the highest paying jobs in the production organization.

Q. After your office investigated the possibility of transfer for the eighteen people who were declared surplus, were any of those people ultimately transferred to other departments or jobs in McDonnell? A. Some were.

Q. What happened to those for whom there was no job found? A. If there was no job found they were laid off.

Q. There was some testimony yesterday about the decision about the layoff, who made the decision for layoffs? Can you explain how that worked? A. The surplus list is sent up to the transfer department. The transfer department then has the responsibility to check all open requisitions of available jobs. In addition to that, if they do not have open requisitions, they have the responsibility to

solicit openings that may be developing in the near future, because the people are currently available. This, after reviewing all of the files of the surplus people and evaluating all of the possible openings, the transfer function was unable to effect a transfer, they would then report back to the operating organization, the remaining people are surplus, they will have to be laid off. We have no openings for them.

Q. Did you have a later meeting with Mr. Green? [521] A. Yes, I did.

Q. Approximately when was that, sir? A. The other meeting I recall with Mr. Green was on the day that he was actually laid off, in Mr. Krone's office, I believe the date was August 28, 1964.

Q. Who requested that meeting? A. Mr. Green did.

Q. Who was present? A. Mr. Krone, Mr. Green and myself.

Q. What was said at the meeting? A. This was a rather lengthy meeting.

Q. How long? A. Three and a half hours.

Q. What was said? A. Mr. Green indicated that he felt he was being unjustly laid off; that he was a black man; there were too few black people in the Electronic Equipment Division and in Department 958 in particular; that he felt that his climbing the Arch was one of the reasons behind the layoff. He also indicated that he was chairman of CORE Employment Committee; and that he didn't think it would be smart for us to lay him off. In addition to this, Mr. Krone and I spent considerable time explaining to Mr. Green that we had been trying to find a transfer for him; we had been unsuccessful. If I recall correctly, the question [522] of the test was brought up, and it was explained to Mr. Green that that was an option, that jobs were open in the Mechanic Electric and Electronics, and if he wanted to take the test to see if he could qualify for

that particular job, the option was given to him and he refused. We were sorry. And that we would continue for the following week to try to find a slot for Mr. Green in the transfer. Mr. Green's reply, which I recall very vividly, was, "I hear what you are saying, but from the white man I only believe what I have in my hand, not what he says."

Q. Was anything else said at the meeting? A. I am sure there were many other things said, but it was a repetition of our trying to assure Mr. Green not to do anything which would put us in an embarrassing position, and that we would continue during the next week to try to find him a job.

Q. Mr. Green was then laid off on August 28th? A. Yes, he was.

Q. Along with a number of other men? A. Yes.

Q. Of Department 958, is that right? A. Yes.

Q. Then he filed certain charges against the company that you heard him testify about yesterday and the day before, is [523] that right? A. Yes, I did.

Q. In connection with those charges was an investigation made by a man named Peter Robertson? A. Yes, there was.

Q. Did you meet with Mr. Robertson during that investigation? A. I believe I was his first contact.

Q. Was anybody else present at that meeting? A. To the best of my recollection, Mr. Robertson came in and presented me with the charge.

Q. The question was whether anybody else was present at the meeting? A. At the initial meeting I don't recall anybody else.

Q. Just you and Mr. Robertson the best you can recall? A. Yes.

Q. What was said? A. Mr. Robertson presented the charges to me and said he wanted to talk to some of the

people involved, and specifically he wanted to talk to Mr. Ed Sinecki.

Q. What did you say? A. I said, OK, you will have to go down to another building where Mr. Sinecki is located. I arranged for an office down there, and Mr. Robertson and I went in the office and I called [524] and had Mr. Sinecki come in.

Q. Did a conversation ensue? A. Yes. Considerable conversation.

Q. What was said? A. Mr. Robertson started to interview Mr. Sinecki, and the conversation became quite heated between Mr. Robertson and myself, because I objected to his method of interrogating Mr. Sinecki. I felt that, and so stated to Mr. Robertson, Mr. Sinecki was honestly trying to answer his questions and that Mr. Robertson was not accepting the answers and was refusing to accept the answers which Mr. Sinecki was giving him. He was questioning Mr. Sinecki's memory constantly and kept assuring him that he could remember things that Mr. Sinecki said he couldn't remember. And during the discussion between Mr. Robertson and I, when I very vehemently disagreed with his approach and his tactics, he told me he was an attorney in the State of Missouri, that he knew well what his rights were, at which time I said, well if you are going to pursue this course, I want counsel here at all times.

Q. What happened next? A. I called the Legal Department and asked for counsel.

Q. What happened next? A. Counsel came down and sat in on the rest of the interrogation.

[525] Q. Who was that? A. That was Mr. John Sant.

Q. He was a lawyer with McDonnell at the time, was he? A. He was Assistant Secretary, I believe, of the company at that time.

Q. So Mr. Sant was present during the remainder of the questioning of Mr. Sinecki? A. That is correct.

Q. Was there anything further to this meeting with Mr. Robertson? A. As I recall, Mr. Robertson was told that in the future in any interrogation with any of our supervision we would like to have counsel present.

Q. Did Mr. Robertson ask for any documents? A. During this particular meeting I can't say, but during the course of the investigation, yes, constantly.

Q. Were there future meetings with Mr. Robertson? A. Yes.

Q. How many? A. I don't recall, but I know he was there for several days.

Q. During this investigation did he speak to a number of people at the company? A. Yes, he did.

[526] Q. It was during the investigation that he demanded certain documents from the company, is that right? A. That is correct.

Q. Did you give him what he asked for? A. To the best of my knowledge, yes.

Q. You have seen Plaintiff's Exhibit No. 33, the green book which Mr. Robertson presented in his testimony? A. Yes.

Q. Have you had an opportunity to look at that book and the documents in it since this trial began? A. Yes, I have.

Q. To the best of your knowledge, are all the documents Mr. Robertson asked for during the investigation included in that exhibit? A. Personally, I don't believe so.

Q. What documents, to your recollection, are missing? A. I don't know, but I am sure Mr. Robertson had more documents.

Mr. Gilden: I am going to object to that, Your Honor.

Mr. Foote: I am not asking—I am just asking of his own recollection how many documents and whether or not any are missing. You can cross-examine on the issue.

Mr. Gilden: I think, Your Honor, if he is going to refute the testimony of Mr. Robertson he should tell exactly [527] what documents are missing. We are going far afield in terms of question and answer.

The Court: Overruled.

Mr. Gilden: I think I should have a right to know what documents are missing.

The Court: He can answer the question.

A. The only way I can really answer the question is, Mr. Robertson, every time I had a file or a memorandum that I was referring to, he would say, "I want a copy of that." If I refused to give it to him he would threaten to subpoena it.

Q. (By Mr. Foote) So it is your recollection that you gave him more documents than what was included in Plaintiff's Exhibit 33? A. That is correct. And he kept asking for more information to be developed than we had.

Q. After Mr. Green was laid off, did the subject of him and his activities come to your attention? A. Yes, it did.

Q. In what fashion? A. Well, after the layoff, the first thing that I recall was in September of '64 when there was picketing on Warson Road outside of Mr. McDonnell's house for a period of approximately ten days to two weeks. This was constantly in the newspapers and I also have seen pictures that were taken by [528] various photographers who were out at the scene.

The next incident I recall was in early October 1964, when I was informed one morning that a stall-in had been attempted on the main arteries leading into the plant. I was also informed that morning that Mr. Green

had stalled his car on Brown Road and locked the door and refused to move the car, at which time he was arrested and taken over to Clayton and booked and that the arresting officer had indicated——

Mr. Gilden: I am going to object to that as being hearsay.

Mr. Foote: It is true that this witness is not before us, Your Honor, but the same reasoning that I gave the Court for sustaining the other questions about reports in the course of duty sustain this question. These are not offered for the proof of the truth or falsity thereof, but just the fact that this man got these reports in the course of his duties.

The Court: Proceed.

A. I was also informed that Mr. Green, upon being arrested, had stated he was demonstrating against McDonnell Aircraft and the unfair treatment that Percy Green had received by the company.

Q. (By Mr. Foote) You said that this took place in early October 1964. Do you remember the exact date when it took place, the stall-in? [529] A. Not the exact date, no.

Q. Are the following roads what you refer to as access roads or arteries used by employees normally to come to McDonnell-Douglas, just answer yes or no: Bridgeton Station Road north of Natural Bridge? A. Yes.

Q. Lindbergh Boulevard and Brown Road, that intersection? A. Yes.

Q. Frost Avenue and Graham Road, that intersection? A. Yes.

Q. Airport Road one hundred yards east of Graham Road? A. Yes.

Q. Brown Road from Highway 70 north to McDonnell? A. Yes.

Q. Do you have—do you normally drive Brown Road? A. Yes.

Q. How often? A. Daily.

Q. Is that the way you get back and forth to work? A. Yes.

Q. Do you have an estimation of how far it is from Highway 70 to the first McDonnell facility? A. From Highway 70 I would estimate half a mile to three-quarters of a mile.

[530] Q. Is Brown Road a two-lane road? A. In that stretch it is.

Q. In the stretch north of Highway 70? A. Up to where the McDonnell property starts.

Q. All two-lane road? A. Yes.

Q. As you drive back and forth to work, what are the normal traffic conditions prevailing in the hours in the vicinity of 7:00 o'clock and thereabouts? A. Very, very heavy.

Q. How long does the heavy traffic last usually around 7:00 o'clock in the morning? I am referring now to 1964 in October.

Mr. Gilden: Your Honor, I think we are getting far afield. It is only a question of what happened on this particular day. What happened every other day of the year is not involved in this lawsuit.

Mr. Foote: All right, fine. I will accept that limitation.

Q. (By Mr. Foote) On October, whatever the date was of the stall-in, in 1964, amend the question that way and answer it, please. In other words, you were driving the same road, were you? A. I was not driving that road on that day.

Q. Did you ever have occasion to observe the traffic on [531] Brown Road at around 7:00 o'clock in October 1964? A. Yes, I did.

Mr. Gilden: Your Honor, I will again object. He has already testified he did not drive that road that day.

Mr. Foote: That wasn't the last question, Mr. Gilden.

The Court: Proceed.

Q. (By Mr. Foote) Did you ever observe Brown Road? You said you didn't drive normally to work that day, but did you ever observe the traffic on Brown Road at about 7:00 o'clock in October 1964? A. Yes, I did.

Q. What was the condition of traffic at that time at about 7:00 o'clock in the morning or thereabouts?

Mr. Gilden: I am going to object to that, Your Honor, unless he lays a foundation that we are talking about the date on which the stall-in occurred.

Mr. Foote: I thought I asked him that question.

Mr. Gilden: You said in October, which means any day in October.

Q. (By Mr. Foote) Let's limit it again. Limiting it to the day you recall the stall-in took place, not specifically that day necessarily, but in the vicinity of that day—Let me ask you about that specific day. Do you remember the day of the stall-in? [532] A. No, not the exact day.

Q. Were you at work on that day? A. Yes, I was.

Q. Do you remember the stall-in happening on a given day or being informed of it? A. I sure do.

Q. Did you have occasion to observe the traffic on that day as you came to work? A. Yes.

Q. How did you come to work in those days or on that day? A. I came down Banshee Road from Lindbergh; Lindbergh Boulevard north to Banshee Road, Banshee Road into the parking area.

Q. Was the traffic heavy? A. Yes.

Q. What time did the shift change in the morning during 1964? A. To the best of my recollection shift changes started from 6:30 and went on through until 8:00 o'clock.

Q. To the best of your knowledge, was the traffic conditions which you have described in a clogged condition during that period of time? A. Yes.

[533] Q. On the access roads around McDonnell? A. Yes.

Q. Approximately how many employees were at McDonnell in those days? A. I believe in excess of twenty thousand people.

Q. Approximately how many of those people were changing shifts during the hours that you have testified to? A. I would say ten thousand, possibly more.

Q. In the early morning hours, you mean? A. Yes.

Q. Did you receive any further reports about Mr. Green? A. Yes, I did. In the latter part of October '64, I received a report that Mr. Green had been convicted in the County Court of obstructing traffic and had been fined.

Q. Do you know the exact date of that? A. I believe it was about the 24th of October. I received a memo.

Q. I will hand you what has been marked and received as Plaintiff's Exhibit No. 47 and ask you if that refreshes your recollection about the date you received that report? A. I just can't be sure about it.

Q. You testified to a specific date. I am showing you Plaintiff's Exhibit No. 47.

The Court: It is not material; let's go.

[534] Mr. Foote: I don't think it is material either.

Q. (By Mr. Foote) The report you received was that Mr. Green had been convicted of obstructing traffic, is that what you testified to?

Mr. Gilden: That is already in evidence, Your Honor.

Mr. Foote: I was asking if he testified to that.

The Witness: Yes.

Q. (By Mr. Foote) Did you receive any other reports about Mr. Green? A. Yes. The next time I recall a situation involving Mr. Green was, I believe, in February of 1965 when Mr. Krone and I and Mr. Krone's secretary were appearing at the Jefferson Hotel and Mr. Krone was to make a talk before the, I believe it was the Society for Social Welfare of the State of Missouri, and Mr. Green was there. And as I recall in the picket line he was handing out literature regarding Mr. Krone's talk.

Q. Did you receive any further reports about Mr. Green? A. The next report I recall was the information I received that Mr. Green was one of the pickets at the Roberts Building. I believe that was July 2nd, 1965.

Q. Did you know his title, if any, with ACTION at that time? Were you aware of any position he held with the organization? A. It was my understanding he was chairman of ACTION.

[535] Q. Were you aware that there was a certain organization that was doing the picketing on that day? A. Yes, I was.

Q. What was the organization? A. ACTION.

Q. What was the report you received? A. The report I received was at approximately 4:20 in the afternoon, members of the group picketing outside the Roberts Building had chained the doors of the Roberts Building closed, and that they were trying to get hacksaws to cut the chains so the employees could get out to go home.

Q. Were there McDonnell employees in the building at the time the door was chained? A. Yes, there were.

Q. Was it ever reported to you that it was Mr. Green who had done the chaining? A. It was not.

Q. But it was reported to you, as I recall your testimony, that Mr. Green was among the picketers at the time the chaining was done? A. That was reported to me.

Q. Mr. Green subsequently applied for work at McDonnell on July 26, 1965, is that correct? A. That is correct.

[536] Q. How did you learn of that application? A. By a telephone call.

Q. Who was with you, if anyone, when you learned of it? A. I was in Mr. Krone's office when a telephone call was received from the employment office, and I was told that Mr. Green had applied for employment that morning.

Q. What was the decision made about his application? A. The decision that was passed on back to the general supervisor of employment was to tell Mr. Green that, thank him for submitting his application, if we had anything for him we would be in touch with him.

Q. What were the reasons for that decision? A. Principally——

Mr. Gilden: I am going to object to that, unless a foundation is laid as to who made the decision.

Q. (By Mr. Foote) Well, you mentioned that Mr. Krone and yourself were in the office. Was there some discussion between you about Mr. Green's application? A. Yes, there was.

Q. Who did make the decision? How was it made? A. It was jointly made.

Q. Was there any disagreement between you? A. There was not.

Q. What were the reasons for the decision? [537] A. The decision was made based upon that fact that Mr. Green had attempted a stall-in which would impede production and had been convicted of that offense as well as having chained the doors of the Roberts Building.

Q. You testified that he did not personally chain the doors.

Mr. Gilden: Your Honor, I am going to object.

Q. (By Mr. Foote) ——as you reported.

Mr. Gilden: (Continuing) I am going to object to counsel trying to interfere with his witness's testimony.

Mr. Foote: I am just trying to straighten it, Your Honor.

Mr. Gilden: I am going to object unless this witness answers the question as propounded.

Mr. Foote: All right, go ahead and answer it.

The Court: I will sustain the objection.

Q. (By Mr. Foote) Go ahead and answer the question. You may finish your answer.

The Witness: What was the question?

(Question read by the reporter as follows:

Q. "You testified that he did not personally chain the doors.")

Mr. Foote: All right, the objection was sustained.

Q. (By Mr. Foote) Did you receive a report that [538] Mr. Green personally chained the doors of the Roberts Building? A. I did not.

Q. When you said the decision was based on his chaining of the Roberts' doors——

Mr. Gilden: Your Honor, counsel is trying to impeach his own witness.

Mr. Foote: I am not trying to impeach him, I am just trying to clarify the testimony. I don't think this is an improper question.

The Court: What is your question?

Mr. Foote: My question is, did you receive a report and if so, did you misstate when you said the decision was based on Percy Green's chaining the door?

Mr. Gilden: Your Honor, I will object.

The Court: I will sustain the objection.

Q. (By Mr. Foote) Were there any other considerations in making the decision? A. I would say there was some question, although it wasn't pertinent, relative to the fact that the job he was applying for was considerably below his skill level.

Q. (By Mr. Foote) What was the job? A. Grade 2 mechanic electric and radio, the level, as I recall it, he was at back in 1957.

Q. Mr. Windsor, you were involved in an investigation of [539] Mr. Green's layoffs, you testified about that. You have been involved in this litigation. In your opinion, from your investigation, was Mr. Green laid off because of his race or because of his civil rights activities? A. In my opinion, no.

Mr. Gilden: I don't understand the answer. You mean either or both? I don't understand the question. We have a question that has two questions in it. I don't know what he is responding to here.

The Court: You may ask him.

Mr. Gilden: You overrule my objection?

The Court: Yes.

Mr. Gilden: OK, Your Honor.

Q. (By Mr. Foote) Mr. Windsor, aside from the civil rights activities, that is the stall-in and the lock-in which you have mentioned, was the refusal to rehire Mr. Green in July, on July 26, 1965, motivated by Mr. Green's color

or by his involvement in other civil rights activities? A. No.

Mr. Foote: No further questions.

Cross-Examination, by Mr. Gilden

Q. Mr. Windsor, you have been in personnel work for many, many years, have you not? A. That is right.

[540] Q. As a member of personnel for many years you are called upon to supply statistical information to various agencies, is that correct? A. Yes.

Q. More so today than ever before, is that correct? A. Yes.

Q. I mean that means Equal Employment Opportunity Commission and various federal Office of Contract Compliance and Department of Labor, is that correct? A. Right.

Q. At least those three agencies? A. Right.

Q. And I am sure the Department of Defense wants figures as well, is that correct? A. DCSAR.

Q. What? A. DCSAR, which is a branch.

Q. Do you know the population or the percentage of population of blacks in the St. Louis Community in the year 1964? A. No, sir.

[541] Q. Do you have that data back at your office? A. I don't believe so.

Q. I will hand you what has been marked as Plaintiff's Exhibit 33, which is a tab 30, and ask you whether these were some of the documents that were turned over to Mr. Robertson? A. I can't certify to that, Mr. Gilden. I can only assume they are.

Q. Are these documents that you testified to that you gave to Mr. Robertson, they would be copies of documents that you had at the office, is that correct? A. They could have been copies of documents we had or they could have been things Mr. Robertson asked us to prepare.

Q. All right. But in no case did you give him your originals, did you? I mean you kept the originals back at the office? A. I can't answer that, I don't recall.

Q. Well, did you give him any original documents? A. I don't know.

Q. You have testified that there are some documents missing out of there. Could you tell me what documents are missing? A. No, sir.

Q. You don't know? A. I don't believe I testified there are some missing. I [542] said I believe we gave him more.

Q. But you don't know for sure? A. No, sir.

Q. OK. Now tell us what that document says in September 1964 as the percentage of black employed at McDonnell-Douglas on that particular date? A. These figures would indicate that the non-white percentage in September 1964 would be five point three four per cent.

Q. And how many—what was the percentage of non-whites being employed, new applicants? A. The per cent non-whites hired is indicated as five point 0 three.

Q. Per cent? A. Per cent.

Q. Now you knew at that time that the 1964 Civil Rights Act had already been enacted by Congress did you not, Mr. Windsor? A. Yes, I did.

Q. And you knew that the effective date of that law wasn't until July 2nd, 1965? A. That is correct.

Q. And that the law became effective or was passed by Congress on July 2nd, 1964? A. That is correct.

[543] Q. I will hand you as part of this document, it says, "Enclosure 2, page 5." Will you tell us about the service workers that were listed there?

The Court: What tab is that?

Mr. Gilden: That is tab 30, is it not, Mr. Windsor? I'm not sure. Tab 30.

Q. (By Mr. Gilden) How many service workers, including janitors, did you have employed by McDonnell as of August 31st, 1964? A. Under the heading on this particular page, it shows two hundred sixty-four.

Q. Total work force of non-whites are how many? A. Eighteen hundred forty-four.

Q. Which makes what percentage were service workers, including janitors? A. I would have to figure it out.

Q. Can you compute it for me, sir? A. Not in my head.

Mr. Foote: Your Honor, I don't believe this evidence is relevant. If it should be, it is already in the record, it is in evidence, and the document would speak for itself.

Mr. Gilden: I will withdraw the question.

Q. (By Mr. Gilden) There is a title too Laborers Unskilled, is there not, Mr. Windsor? [544] A. Yes, there is.

Q. How many did you have of those? A. This particular sheet shows one hundred forty-four.

Q. Unskilled laborers, that would be non-white, is that correct? A. Non-white.

Q. All right. A. Well, the heading doesn't show it.

Q. I just don't want—I want to be clear about it. You tell me. A. Mr. Gilden, this is like many, many pieces of paper that are floating around. I don't know where it came from or who prepared it or what it is.

Q. I am just asking, you testified—it is in evidence, Mr. Windsor. A. I am aware of that, but I don't know what the paper is or where it came from.

Mr. Foote: What is the question? Is it about one document?

Mr. Gilden: I asked the question as to the unskilled workers, and I think you testified there were one hundred forty-four and you didn't know whether that referred to non-white. Is that your testimony?

A. Mr. Gilden, what I am trying to testify is, if you ask [545] what this paper shows, I can read from it.

Q. (By Mr. Gilden) That is all I want to know. Is that non-white employees? A. Reading this report, I would assume that the reference is one hundred forty-four unskilled laborers non-white.

Q. And that could include—— A. (Continuing) As of 31 August 1964.

Q. That could include Chinese and Indians, is that correct? A. It could.

Q. Now do you recall meeting with Mr. Connell with the Missouri Commission on Human Rights? A. Yes. On a number of occasions.

Q. With respect, sir, to the complaint of Percy Green? A. Yes.

Q. You heard Mr. Connell testify here in court, did you not? A. Yes.

Q. Do you recall the conversation he was referring to in your office? A. I recall a meeting in my office.

Q. Do you recall—you heard Mr. Connell testify, did you not? A. Yes, I did.

[546] Q. Do you recall his statement about what you told him about the fact that there were at least fourteen or fifteen reasons why McDonnell-Douglas would not hire Percy Green? A. I heard Mr. Connell make that statement.

Q. And that you had written these reasons down? A. Are you asking him whether he had?

Q. (By Mr. Gilden) You heard him say you had written these down? A. I heard him say that.

Q. Did you in fact write these reasons down? A. I don't know what Mr. Connell was referring to; because I am sure we did not write any reasons down in Mr. Connell's presence.

Q. I didn't mean in front of Mr. Connell. Have you written those reasons down elsewhere? A. I recall a meeting Mr. Langton and I had where we had some discussions of this nature, yes.

Q. And you wrote fourteen or fifteen reasons down? A. I don't recall how many there were.

Q. Were there at least fourteen or fifteen? A. I don't recall.

Q. Were there more than ten? A. I would think so.

Q. Did you also hear Mr. Connell say that you told him [547] that these reasons could very well be misinterpreted by Washington? A. I don't recall making any statement to Mr. Connell.

Q. No statement? You didn't say anything at that meeting at all? A. I am sure I said some things at that meeting. I had counsel sitting right with me.

Q. But you did talk at that meeting, did you not? A. Yes, I did.

Q. Mr. Morley was present? A. Yes, he was.

Q. Now these more than ten reasons, where are they at the present time, that you wrote down? A. I believe—I am trying to indicate, Mr. Gilden, Mr. Langton and I had a meeting in my office, and we were doodling on the blackboard.

Q. It was written down on a blackboard, then? I am sure you didn't preserve the blackboard? A. No, we didn't.

Q. Did you write it on a piece of paper? A. Not to my knowledge.

The Court: Just a minute, who is Mr. Langton?

Mr. Gilden: He is the attorney.

The Court: All right.

[548] Mr. Gilden: May the record show that he is the attorney in the courtroom?

The Court: Very well.

Q. (By Mr. Gilden) Now you testified that Mr. Green was arrested and he was fined for obstructing traffic, did you not? A. I testified that this had been reported to me.

Q. All right. Now do you have a policy of your company not to hire people that have been convicted of traffic offenses? A. We do not.

Q. Do you have a policy of your company not to hire people that are guilty of felonies? A. Not specifically.

Q. Is there any policy of your company not to hire people that have been found guilty or pled guilty to misdemeanors? A. Not specifically.

Q. Isn't it a fact, Mr. Windsor, that if you went through almost every record of McDonnell-Douglas you would find somebody who had been guilty of some traffic offense? A. No, sir.

Q. That is not true? A. No, sir.

[549] Q. In any of these demonstrations that you testified to with respect to Mr. Green, the stall-in, the Roberts Building, the picketing outside the Sheraton Hotel, was it? A. I believe it was the Sheraton Jefferson.

Q. The picketing of Mr. McDonnell's home, do you know of any instance in which any person was injured? A. No, sir.

Q. Do you know of any instance in which any property was damaged? A. No, sir.

Q. Do you know of any instance, any other instance of any conviction of Percy Green from the time that he was laid off by McDonnell-Douglas until the time he came in with an application for employment in July of 1965, other than this one time of obstructing traffic? A. Not in my memory.

Q. Not in your records at all, is that correct? A. I would have to review the application blank.

Q. Based upon what you know right now, there is no other instance, is that correct? A. I have a vague recollection of reading something in the paper; I don't know the time.

Q. I am talking about your own records, sir, do you have anything else that shows he was convicted of any other [550] offenses?

Mr. Foote: I thought the question was of his own recollection, and his answer was he would have to review the record. He didn't testify that, the question was not asked that way the first time. You can ask the questions, but one at a time, please.

Q. (By Mr. Gilden) Now, Mr. Green came in with an application for employment on July 26, 1965, is that correct, Mr. Windsor? I just handed you Plaintiff's Exhibit 1. A. That is correct.

Q. What was the title of the job that Mr. Green was asking for on that particular date? A. Radio and electrical mechanic.

Q. Were there vacancies on that day for that particular job? A. Yes, there were.

Q. And he was not hired by your company? A. He was not hired.

Q. Mr. Windsor, where did you grow up? A. St. Louis.

Q. In what community? A. I spent—Do you want it from birth?

Q. Well, I hope it is not too far back. A. The first ten years of my life I spent on Athlone [551] Avenue adjacent to O'Fallon Park. I then moved to Richmond Heights.

Q. What year was that? A. That was in approximately 1925. I lived on Woodland Drive in Richmond Heights until approximately 1939, then lived in Webster Groves.

Q. Is the community you live in right now a white community or black community? The neighborhood in which you live? A. Well, the neighborhood I live in right now is predominantly white.

Q. All right. Now, the schools you went to, were they all segregated schools? A. I don't believe so.

Q. You mean they were integrated? Blacks were in the classroom with you? A. Certainly, at the University of Missouri.

Q. At the university—I am talking about your grade school and high school levels, education? A. I believe through high school they were segregated.

Q. When did you go to the University of Missouri, what year? A. 1937.

Q. And you say there were blacks on campus during that [552] period of time? A. I believe there were.

Q. You have heard of Lincoln University, have you not? A. Yes, I have.

Q. And you knew Lincoln University was a black college that was operated by the State of Missouri? A. Yes.

Q. You testified you didn't want Mr. Green to put you in an embarrassing position after his layoff. Can you explain that to me? A. I believe Mr. Green had indicated he intended to take some positive action if we didn't give him a transfer prior to the layoff.

Q. When you say positive action, what was he referring to? A. I believe he was referring to taking some—well, the best I can say is, it was implied.

Q. Was he going to register that he was discriminated against because of his race because of this layoff? A. I

don't think it was that. I think he made some other indications but I don't recall exactly what they were.

Q. What was embarrassing about his position with you? A. If he was going to attempt to go out and embarrass the company or our organization——

[553] Q. How could he do that to McDonnell? A. I don't know.

Q. Wouldn't it be a fact that the embarrassment would occur, sir, if he did file a complaint of racial prejudice and discrimination because of his layoff? A. No, sir. I do not feel that.

Q. You don't feel that? A. Every citizen has that right in this country.

Q. To file a claim of racial prejudice and discrimiation? A. Yes, sir.

Q. Even in August of 1964? A. Yes, sir.

Q. All right. But that wasn't embarrassing to the company? A. No, sir.

Q. You talked about this test that was to be administered, you don't have the test here this afternoon, do you? A. No, sir.

Q. Where is the test? A. I would say it is out in the testing department.

Q. Are you still using the same test today you were going to give Mr. Green in 1964? A. I am sure we are.

Q. Has it been graded by the Equal Employment Opportunity [554] Commission? A. I am sure it has been.

Q. You said that Mr. Green was given some consideration by the company in that efforts were being made to find employment for him, is that correct? After he was laid off? A. We told Mr. Green on that Friday afternoon that we would continue for the following week to try to find a spot for him.

Q. You would give him one week? A. I don't believe there was a time limit.

Q. You said for a week. A. Could I rephrase the answer and put it in proper context? I believe Mr. Green was told we will continue——

Q. (Interrupting) Continue to do what? A. To try to find a transfer.

Q. For how long? A. I am not sure there was a time limit.

Q. All right. Now you knew that Mr. Green went out and picketed Mr. McDonnell's home, did you not? A. Yes.

Q. Were you still looking for a job for him during that time? A. I don't recall.

Q. When did you stop looking for a job? [555] A. I don't know.

Q. We have a document here that shows that you checked with other sections of McDonnell-Douglas or McDonnell Aircraft Corporation at that time for prospective jobs for Mr. Green, is that correct?

Mr. Foote: Which time is this, Mr. Gilden?

Mr. Gilden: After the layoff.

Mr. Foote: I thought your earlier question was about afterwards.

Mr. Gilden: I mean the layoff. After August 28th, 1964.

A. I don't know what documents you are referring to.

Mr. Gilden: Do you remember the tab number on that, Mr. Foote? You asked some questions about it.

Mr. Foote: 29.

Q. (By Mr. Gilden) You testified from informal memo dated 3 September 1964. Were there any other memos prepared for you under your control or for your observation after September 3rd, 1964? A. I do not know.

Q. Who would know something about whether a job was obtainable for Mr. Green after that date? A. I don't know.

Q. Did you have any written communication at that time or [556] policy decisions of McDonnell with respect to people who were laid off with respect to their right to obtain employment in the future? A. That is a very general statement. I wish you could clarify it.

Q. Did you have a policy statement with respect to employees being laid off as to their right to be rehired by McDonnell-Douglas and the consideration to be given to them? A. Not a policy statement as I understand policy.

Q. What did you have? A. It was a—There is an agreement in the union contract relative to recall rights.

Q. Is that the only thing you had? A. That is the only thing I am aware of in writing.

Mr. Gilden: Will the Court bear with me for one moment?

Q. (By Mr. Gilden) I will hand you what has been marked Plaintiff's Exhibit 33 at tab 16, entitled "Instructions to Laid Off Hourly F.E.P. Employees". Have you ever seen that before? A. I have seen documents very similar to this, yes.

Q. All right. Mr. Windsor, turning to page 3 of that, paragraph 7, where it says on top "Laid Off Hourly F.E.P." Read 7-C to the Court. [557] A. (Reading) It is with deep regret that your company was forced to make a layoff to properly balance its work force in relation to the production schedule adjustments. We are vitally concerned about your future employment and will take certain steps which may be of some help to you in getting a job:

A. The Missouri State Employment Service will be notified of your layoff.

B. We will notify many industrial companies in the St. Louis area of the availability of this group and offering specific information as to the individual's name, address and telephone number.

C. You will be given first consideration for any future available openings at MAC for which you are qualified.

D. Please feel free, when applying for a job, to tell your prospective employer that we will be glad to give him a record of your service at MAC.

We would like to suggest that you keep in close touch with the State Employment Agency nearest to you (the address is listed in the telephone book).

Q. All right, you read paragraph C for the Court. Did you give Mr. Green first consideration for the job commensurate with his abilities at McDonnell-Douglas after his layoff on August 28, 1964?

Mr. Foote: I object to the question unless you put [558] it the job for which Mr. Green applied, which was July 26, 1965, according to his testimony.

Mr. Gilden: There is nothing in the record that says it has to be a reapplication.

Mr. Foote: I just didn't understand the question. It was not clear to me whether you meant the first time Mr. Green came back in or whether that document requires them to go out and get him.

Mr. Gilden: Your Honor, the question was rather clear. I asked whether——

The Court: Overruled, he may answer.

The Witness: Would you restate the question, please?

Mr. Gilden: Would you read the question back, please.

(Question read by the reporter as follows:

A. "All right, you read paragraph C for the Court. Did you give Mr. Green first consideration for the job com-

mensurate with his abilities at McDonnell-Douglas after his layoff on August 28, 1964?")

Q. I cannot answer that question.

Q. (By Mr. Gilden) Why can't you answer it? A. Because I do not have a record of all the jobs that were available.

Q. Well, you were personnel director during this period of time, were you not, sir? [559] A. No, I was not. I was manager of Personnel Services.

Q. Well, that would give you access to information, would it not, sir? A. I would have access to information, yes.

Q. And people were operating in the Personnel Department under your supervision and control? A. Certain functions, yes.

Q. As I remember the status of things, there was Mr. David Lewis on top, then Mr. Robert Krone, then you were below Mr. Krone? A. That is correct.

Q. Then supervisory personnel underneath you, is that correct? A. That is correct.

Q. I mean, so you were on your own totem pole on terms of a chain of authority, is that correct? A. That is correct. But I still can't answer the question the way you put it to me.

Q. Is it your statement that there wouldn't be any jobs available to Mr. Green after August 28, 1964, that would be commensurate with his duties and his background? A. Mr. Gilden——

Q. (Continuing) ——and his capabilities? A. If I can have the liberty of attempting to clarify the [560] question, I will.

Q. Certainly, go ahead. A. The Employment Department has the responsibility of doing the hiring. They are dealing with hundreds and hundreds of requisitions over in

that office constantly. The way you have put the question to me I couldn't answer the question, I don't know.

Q. Who would have the information if you didn't have it? A. I would say the only way that question could be answered would be that someone would have to go back, if the records were available, and take from the day that Mr. Green was laid off until the time you are talking about and attempt to resurrect all the openings that were available and see if Mr. Green were qualified for them.

Q. So you have already testified that at the time of the stall-in in October of 1964 there was something like, how many employees—I am sorry, I think it was just on one shift, ten thousand? A. You improve my mind when you hand me this.

Q. How many employees did you have at McDonnell in 1964? A. The last figure I saw here was something like thirty-four thousand.

Q. Thirty-four thousand? How many shifts did you have? A. Three.

[561] Q. So that is around ten thousand a shift, right? A. It would be more than that on the first shift.

Q. All right, let's just make it conservative, ten thousand each shift. All right, that was in October of '64 you had better than thirty thousand jobs available, is that correct, at McDonnell-Douglas? A. That is what the figures in here indicate.

Q. All right. Is it your testimony that you don't know whether there was a job opening for Mr. Green commensurate with his duties and background and his experience at McDonnell-Douglas after August 28, 1964? A. I can't answer that question. I won't attempt to hypothesize it.

Q. Did you know Mr. Green's seniority at McDonnell-Douglas? A. Mr. Gilden, are you talking about seniority or service?

Q. Service; I will leave seniority out. Service with the company. A. I am aware of Mr. Green's record and his service time.

Q. Do you know when he started employment with McDonnell Aircraft Company? A. I can approximate it.

Q. Give me the approximate date. [562] A. About 1956 or '57.

Q. And he had one of these very low badge numbers, is that correct? A. I don't know what his badge number is.

Q. But it is true that in succeeding years as people came in for employment, they would get a higher badge number than the person who had received a badge number the year before? A. That is correct.

Q. All right. So the lower badge number indicates that you had had more service than a higher badge number indicates in most cases? A. Not necessarily so, not if a person had broken service.

Q. I understand that, but in most cases it would be true he would have more service? A. A lower badge number indicates that that individual initially came to work for the McDonnell Company earlier than a higher badge number.

Q. You knew Mr. Green had never been discharged by the company before, is that correct? A. Mr. Green had never been discharged.

Q. The only break in his service was the time he went in the Army, right? A. That is correct.

Q. And that doesn't go against the man, does it? [563] A. No, sir.

The Court: Mr. Gilden, it is 2:25. You wanted to leave at 2:30, are you going to make it or not?

Mr. Gilden: May I put the testimony over until tomorrow morning?

The Court: Can you finish by 2:45?

Mr. Gilden: No, Your Honor, and I may have some rebuttal. There are a couple of things I want to read from the deposition and I may want to put Mr. Green on for a few questions too.

The Court: We will recess until 10:00 o'clock tomorrow morning.

Mr. Gilden: Thank you.

(Thereupon, the Court declared a recess until 10:00 o'clock the following day, January 15, 1970, at which time court was duly reconvened, the parties appeared and the following proceedings were had:)

[564] **Morning Session**

Thursday, January 15, 1970; 10:00 O'Clock A.M.

Mr. Foote: Will you mark this Defendant's Exhibit F.

(Thereupon, the document above referred to was marked by the reporter for identification as Defendant's Exhibit F.)

CHARLES L. WINDSOR

recalled, having been heretofore duly sworn, testified further as follows:

Mr. Gilden: May I proceed, Your Honor?

The Court: Yes.

Cross-Examination (Continued) by Mr. Gilden

Q. Mr. Windsor, I believe you testified yesterday that you didn't want Mr. Green to embarrass McDonnell by filing complaints of discrimination against it, is that correct? At the time of his layoff? A. I don't remember that quotation, Mr. Gilden.

Q. Why did you feel, just so there is some clarification, why did you feel he would embarrass the company at that time, at the time of the layoff? A. I don't remember using that word.

Q. You never used the word embarrassed? A. I testified—I am testifying I don't recall making that statement.

[565] Q. You don't recall saying you were embarrassed? A. No, sir.

Q. Or that he would embarrass the company? A. Could the statement be read back to me?

Mr. Gilden: I am sure that is some five hundred questions away, Your Honor.

The Court: It would be impossible to find it in the transcript, we would be here all day. Go ahead.

Q. (By Mr. Gilden) You don't recall making that statement on direct examination by Mr. Foote? A. Would you rephrase the question so I can be sure I understand what you are asking.

Q. Did you feel, or did you say to Mr. Green at the time of his layoff that you did not want him to embarrass the company in any way? A. I don't remember the statement in that particular context.

Q. You tell me what you told Mr. Green, then. A. To the best of my recollection, the discussion with Mr. Green was something to the effect of, please don't do anything that might put us or you in an embarrassing position.

Q. That is all right. What did you mean by putting McDonnell in an embarrassing position? A. I don't recall exactly what Mr. Green's allegations [566] were but I do have a recollection that he had indicated he might take some precipitous action against the company.

Q. Why would that place McDonnell in an embarrassing position? A. This was hypothetical, Mr. Gilden, I don't

know. Mr. Green did make some allegations. I don't recall specifically what they were.

Q. Did you feel that his allegations were true and that might embarrass McDonnell Corporation? A. I didn't know what they were.

Q. Well, did he tell you that he felt there was racial discrimination against him because of this layoff? A. He definitely said that.

Q. All right. Do you feel his claim of racial discrimination would embarrass McDonnell at that time? A. It would depend upon what form of activity he was going to engage in.

Q. Well, assuming that he intended to notify the federal government through various supply agencies, like Department of Defense, Department of the Navy that there was racial discrimination at McDonnell. Would that embarrass McDonnell? A. I do not believe it would.

Q. What did you feel was embarrassing? [567] A. As I have testified, Mr. Gilden, Mr. Green made some allegations of taking some action.

Q. What did he say? A. I did not know what the action was Mr. Green was going to take.

Q. Well, did he ever specify what action he was going to take against McDonnell at that time? A. Not to my recollection.

Q. So your statement about embarrassing McDonnell was merely something that you just stated without any knowledge of what you were stating or any basis for the statement? A. Other than Mr. Green's allegations that he might take some action.

Q. Why do you dislike Percy Green as a person? A. I do not.

Q. You don't? A. No, sir.

Q. Do you have any racial prejudice, Mr. Windsor? A. Mr. Gilden, that is a very, very broad question.

Q. Do you have racial prejudice? A. I am sure that all of us have some prejudices. If you would like to know and if the Court will permit, I would be glad to give you a dissertation on my feelings relative to the Negro.

[568] Q. Do you have any prejudice against Mr. Percy Green? A. If you will identify what you mean by prejudice.

Q. Are you prejudiced against him because he is black? A. No, sir.

Q. Are you prejudiced against him because he has a beard? A. No, sir.

Q. Or had a beard? A. No, sir.

Q. Are you prejudiced against him because of the way he dresses? A. No, sir.

Q. Were you ever prejudiced against him because of the way he dressed? A. I do not believe so.

Q. Was there any company policy in 1963 and 1964 about the way people were to dress at McDonnell? A. Mr. Gilden, to the best of my knowledge there has never been any policy statement ever written on the method of dress of any employee.

Q. Was there anything keeping a person or preventing him from growing a beard? A. No, sir.

Q. Was there anything preventing him from wearing ordinary dungarees or any other kind of attire?

[569] Mr. Foote: Pardon me, Mr. Gilden. Will you clarify the question? You have been talking about Department 958, is that what your question is about?

Q. (By Mr. Gilden) Let's say in Department 958. Was there anything keeping Mr. Green from wearing what he did at that particular time? A. Was there anything?

Q. Any regulation of McDonnell Aircraft Corporation specifying a standard of dress for Department 958 in the year 1964? A. I am not aware that there was ever any written regulation. Each department monitors that on their own.

Q. There was nothing from Personnel that you had sent out to Department 958 as to the dress or standards of dress at that time? A. We in the management group feel that it is the responsibility of the individual managers——

Mr. Gilden: Your Honor, I am going to ask that the questions be answered. I am asking whether he had sent out any data or any standards of dress to Department 958, a very simple question, his department, the Department of Personnel.

The Court: You can answer then explain.

A. The answer to your last question is no.

Q. (By Mr. Gilden) All right. [570] A. (Continuing) May I go on, Your Honor?

The Court: Yes, go ahead.

A. In the management philosophy of our organization we feel——

Mr. Gilden: I am going to object to the philosophic bases of McDonnell. We are just concerned about the facts here, Your Honor. If we are going to start getting into philosophy we can be here a long time.

The Court: You have been asking him about his philosophy about a lot of things, Mr. Gilden.

Mr. Gilden: I am not asking about his philosophy, I am asking how he governs himself with respect to black people, which is a rather clear statement.

The Court: I will overrule the objection, you may explain.

A. In the management philosophy of our organization we feel it is up to the individual department managers to see that proper dress is maintained in their respective areas.

Q. (By Mr. Gilden) Now, you attended the meetings with Mr. Robertson, did you not? A. I attended some meetings.

Q. Also Mr. Krone was present when you were present? A. I don't recall.

Q. With Mr. Robertson? You don't recall? [571] A. No, sir.

Q. Were you here when Mr. Robertson testified? A. Yes, sir.

Q. Did you hear him testify that he talked to Mr. Krone and at times Mr. Krone would leave and you would walk in and it was sort of cloudy as to who was there at any particular time, do you recall that? A. I listened to Mr. Robertson's testimony, yes, sir.

Q. Is that true that you did walk into Mr. Krone's office on occasion while Mr. Robertson was there and discussion took place while you were present and Mr. Krone was present and Mr. Robertson was present? A. I don't know what time we are talking about. I don't see how I can possibly answer the question.

Q. I am talking about the period of the investigation by the Missouri Commission on Human Rights after the complaint was filed with them in August 1964. That is rather clear. A. I don't recall.

Q. All right. Did you have anything to do with the preparation of the totem pole in Department 958? A. No, sir.

Q. Do you know when Percy Green climbed the Arch? A. No, sir.

Q. When did you become aware that he had climbed the Arch? [572] A. I believe the first time that I became aware of it was when I heard Mr. Green refer to it.

Q. That would have been somewhere around the time of his layoff in August of 1964? A. Approximately two weeks prior to the layoff.

Q. Of your own knowledge do you know when the decision was made in Department 958 as to the layoff of certain individuals? A. The question is too broad for me to answer. This is a dynamic thing that is going on constantly.

Q. You have been here since Mr. Robertson testified? A. Can you be more specific, Mr. Gilden?

Q. You have heard the testimony, have you not, about the layoff of Percy Green? A. Yes, sir.

Q. You have also heard the testimony that other people were laid off at the same time that Mr. Green was laid off? A. Yes, sir.

Q. All right. Now I am talking about the group of individuals that were laid off, including Percy Green. When was the decision made for the layoff of these particular people, if you know? A. To the best of my knowledge, that decision was probably made late Friday afternoon, I believe the date was [573] August 28, 1964, that the transfer function had been unable to find other jobs for a certain group.

Q. Well—— A. (Continuing) Therefore, they were subject to layoff.

Q. All right. Now let me ask this question. When was the decision made that they were surplus in that department? A. I would say that decision was made when the surplus list was sent over to the transfer function for review, which was approximately two weeks prior to the layoff.

Q. So you would say, then, around the middle of August of 1964 the decision was made that they were surplus? A. Yes, sir.

Q. Do you know when they were informed that they were surplus? A. No, sir.

Q. Did your department have anything to do with the administering of the test that was given to the men who were declared surplus? A. Yes, sir.

Q. All right. I will hand you what has been marked Plaintiff's Exhibit 33, tab 17. I will show you the name Graville on that, which has already been identified as the totem pole; Mr. Windsor, do you see that? A. Yes, sir.

[574] Q. Do you know Mr. Graville? A. No, sir.

Q. Do you know what happened to Mr. Graville? A. Yes, sir.

Q. What happened to him? A. Mr. Graville was transferred to a department in what is known as our automation company.

Q. Do you know when that transfer took place? A. I believe it was Monday following the layoff.

Q. I think there was testimony that he was doing calibration type work. Would that be correct? A. I do not know.

Q. You don't know the type of work he performs? A. All I know is he is a lab technician.

Q. Is he still a lab technician at this time? A. No, sir.

Q. What is he doing now? A. I do not know, he left the company.

Q. I will hand you Exhibit 33, tab 20, what has been titled Biographical Summary for Daniel Graville. Will you read the top of that particular exhibit? A. Failed test for inspector R.E.E. Mental code 4 electronics code 2.

Q. That means he flunked the test, right? [575] A. He failed one test.

Q. All right. Doesn't that mean—— A. For inspector, radio electric and electronic.

Q. He failed that test? A. Yes, sir. That is what this says.

Q. All right. I will give you Mr. Percy Green's biographical summary and ask you to read the top of that? A. Refused testing for inspector R.E.E.

Q. And that is the same test that Mr. Graville flunked, is that correct? A. It would appear to be.

Q. All right. Now you testified that this test that was being administered was for mechanic electric radio and electric, is that correct? A. An inspector.

Q. An inspector? A. Yes, sir.

Q. And it was a production job, is that correct? A. It was under the production organization.

Q. And it was actually a better job than lab technician job? A. Yes, sir.

Q. All right. Mr. Windsor, I am sure you have reviewed Mr. Green's file before you came into court? [576] A. No, sir.

Q. You haven't? A. No, sir. Not since the day in your office when you took my deposition.

Q. You haven't talked to anybody about this case since then? A. Yes, sir, I have.

Q. What? A. I have.

Q. Oh, you have? A. Yes, sir.

Q. I am sorry, I thought you answered my question you hadn't talked to anybody. A. You asked me if I had reviewed Mr. Green's file prior to coming into court. I said not since the day in your office.

Q. I see. Now do you know what kind of work Mr. Green was doing before he became a lab technician? A. From the record I understand he was mechanic electric and radio.

Q. Do you know how long he had performed that work? A. Approximately.

Q. About, give me how many, what period of time. A. It would be six or seven years with almost two years out for military service.

[577] Q. Two years out of the six or seven, meaning four or five? A. Yes.

Q. Four or five years, something like that? A. Four or five years with our company.

Q. To your knowledge do you know whether he did some technical work while he was in the Army? A. All I know is what is on his application.

Q. What does that show? What kind of work did he perform? A. I would have to review the application to give you the exact wording. I only have a vague recollection of what it is.

Q. Were there jobs available in mechanical electric and radio at that particular time to men for which this test was being administered? A. It is my understanding there were.

Q. All right. Was there any particular reason why Mr. Green would have to be given a test for those duties he had performed prior to coming into this department, being a lab technician, if he had already had the experience? A. I think there are two or three questions there.

Q. Well, just answer——

The Witness: Could you ask me one question, please?

[578] Q. All right. Is there any reason why he would have to be given a test for work that he had already performed before for some four or five years? A. I don't know that to be true.

Q. Well, you testified that that was the work he had done before and that there was a job available—— A. I said mechanic electric and radio.

Q. Was that different than what he was doing before? A. Mechanic electric and radio is what he was classified as before.

Q. Right. That was the test at the time of the test that was being administered. A. No, sir.

Q. What was the test that was being administered? A. Mechanic electric and electronics.

Q. Is that a different classification? A. Yes, sir.

Q. That is different than mechanic electric and radio? A. It is one of the highest electronic classifications in the production department.

Q. I see. It is different than what he had done before? A. Yes, sir. He had never held that classification.

Q. Now you testified that you and Mr. Langton put something like ten reasons or better on a blackboard, right? [579] A. Yes, sir.

Q. Can you give me those ten or better reasons—Strike that. When did you do this? A. I believe Mr. Langton and I were discussing Mr. Green's situation in my office one day in either the latter part of December or November or the early part of December.

Q. What year? A. 1964.

Q. All right. Is that when you put the reasons down on the blackboard? A. I think this is when we did this.

Q. Can you give me the ten reasons or better that you placed on the blackboard? A. I could only speculate on what they might be. I believe I explained that to you yesterday, Mr. Gilden. I can't remember what we put on the blackboard.

Q. You don't recall the ten or better reasons you placed on the blackboard? A. Not specifically.

Q. What is your feeling about employees of McDonnell-Douglas who participate in civil rights protest demonstra-

tions? A. Well, I don't think I am judge and jury on what our employees do on the outside, Mr. Gilden.

Q. Would that affect their employment at McDonnell-Douglas [580] Corporation with you as head of Personnel? A. Would——

Mr. Foote: I object to the form of the question. What do you mean by affect the employment?

Q. (By Mr. Gilden) Would you consider that as something adverse to them? A. You mean would we take any disciplinary action against them?

Q. I will ask that question. Would you take disciplinary action if they participated in civil rights protests? A. No, sir.

Q. All right. Would that be a consideration for promotion within the company? A. I don't think I can answer the question.

Q. Let me ask you this. Would the fact that men picketed in front of Mr. McDonnell's home be a mark against him when he was being considered for promotion? A. If he was being considered for promotion I think it certainly would be a consideration if he was picketing Mr. McDonnell's home.

Q. And it would be an adverse consideration? A. I said a consideration.

Q. Would it also be a consideration, sir, in terms of hiring if you knew that he picketed Mr. McDonnell's home? [581] A. I think that would be one of many considerations. When we hire people we evaluate the complete file.

Q. You have talked about the philosophy of McDonnell-Douglas, do you have a personal feeling against civil rights protests? A. No, sir.

Q. Was there a civil rights committee at McDonnell-Douglas Corporation that had been set up by certain employees? A. I recall an ad hoc group that called them-

selves the Committee of Two Hundred, if this is what you are referring to.

Q. When did that start? A. Several years ago.

Q. Was it while Mr. Green was employed at McDonnell-Douglas? A. I don't believe so.

Q. Was it in existence at the time that he made application? A. I don't recall.

Q. Is it possible it could have been in existence at that time?

Mr. Foote: I think the witness has testified he doesn't recall.

Q. (By Mr. Gilden) What was the reason for the committee, Mr. Windsor? [582] A. I don't know what the reason for the committee was.

Q. Did it ever meet with you? A. Yes, sir.

Q. What was their complaint if they had any? A. Generally in the area of racial discrimination.

Q. All right. Were they two hundred black people? A. I do not know that.

Q. The people that met with you, were they black?

Mr. Foote: Your Honor, I don't want to interfere with the cross-examination, but the witness has testified to the best of his recollection the committee wasn't even in existence at the time in issue in this lawsuit. Whatever complaints they had against the company afterward I don't think relevant to this case.

Mr. Gilden: He says he doesn't know. That doesn't mean they were not in existence at that time.

The Witness: I believe I testified two years ago, Mr. Gilden.

Mr. Gilden: The question was specifically were they in existence at the time of his application.

The Court: Didn't he say he didn't know?

Mr. Gilden: He didn't know.

The Court: What is your question now?

Mr. Gilden: My question is if they may have been in [583] existence at that time.

Mr. Foote: I don't think there is a proper foundation for these questions. There is no evidence in the record at all so far about the committee of two hundred. If he has evidence that they were in existence at the time I think that evidence should be in as a foundation for these questions and it is not.

The Court: What is it you want to ask him about the committee?

Mr. Gilden: I think what we are getting into is that Mr. Green's civil rights protests at McDonnell was being reflected by other individuals at McDonnell at the same time, and his registering protest seems consistent with other registrations of protests by other individuals, other employees of McDonnell, which gives validity to his charge.

Mr. Foote: I disagree that any such reason gives validity to Mr. Green's charge. I think his charges are going to stand or fall on their own face. I think we are getting into the area of a pattern of discrimination suit. It sounds very much like that to me. Whatever the Committee of Two Hundred was it was after the time he was not given a job in July of 1965. I think it is incumbent upon the plaintiff to bring that evidence before the Court to lay a foundation for these questions.

The Court: Well, as I recall the witness's testimony, he has testified he didn't know when the committee came into [584] existence and he doesn't know what their purpose was. What do you want to ask him now?

Mr. Gilden: He does know their purpose because he testified they came to him and told him what their purpose was.

The Court: What?

Mr. Gilden: He testified they came to him and told him what their purpose was, and it was racial discrimination. It is in the record.

The Court: When?

The Witness: May I clarify this, Judge?

The Court: Yes.

The Witness: To the best of my recollection the first I heard of the "so-called Committee of Two Hundred" was approximately in 1968, when a young man called and wanted to talk regarding racial discrimination and stated he was the chairman of the committee.

Mr. Foote: I renew the objection, Your Honor. I don't think that is relevant.

The Court: What is the question now that you want to ask?

Mr. Gilden: Well, the question, he said that the first he heard was in '68. I will ask this, did the racial discrimination relate back to the period when Mr. Green was—the charges relating to racial discrimination relate back to the [585] time when Mr. Green was employed or when he asked for a job?

Mr. Foote: I will renew the objection, Your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Gilden) Mr. Windsor, what is the difference between the job classification of mechanic radio and electronic and mechanic radio and electric? A. In the mechanic electric and radio there are four labor grades which define various levels of proficiency in that particu-

lar classification. There is a grade 5, a grade 3, a grade 2 and a grade 1. Mechanic electric and radio is a production assignment where electric and radio components, wire bundles are installed in aircraft and other vehicles. The mechanic electric and electronic classification and its corollary classification inspection radio electric and electronic has only one grade. The mechanic electric and electronic has to be able to troubleshoot and to understand the various electronic systems in the aircraft. These systems are the types such as radar, automatic fire control, navigation and instruments, and in each aircraft there is normally a brand new system. The mechanic electric and electronics has to learn a new system and then be able to troubleshoot that airplane for that system.

Q. Would the pay of the mechanic radio electronic in one category, you said there was only one job—— [586] A. One grade.

Q. Is that comparable in pay to mechanic electric and radio? A. No, sir. It is considerable higher pay.

Q. Would it be higher than the highest of mechanic electric and radio, grade 1? A. I would have to look at the rate ranges to see if there is any overlapping.

Q. It is conceivable they might be the same pay? A. I don't know without looking at the contract book.

Mr. Foote: The contract is in evidence, I believe. Maybe we can shorten this with the contract. Maybe we can show him the contract book and get his answer.

Mr. Gilden: I don't have anything further.

The Court: Any redirect?

Redirect Examination, by Mr. Foote

Q. Just on this last question, Mr. Windsor, can you tell from the various union contracts which are in evidence, which was higher paid, mechanic electric and electronic or

mechanic electric and radio, the highest rate of the latter at the time that Mr. Green was laid off? A. It was in '63. Could I have the question back, please?

Mr. Foote: Would you read it back?

[587] (Question read by the reporter as follows:

Q. "Just on this last question, Mr. Windsor, can you tell from the various union contracts which are in evidence, which was higher paid, mechanic electric and electronic or mechanic electric and radio, the highest rate of the latter at the time that Mr. Green was laid off?")

A. The mechanic electric and electronics had a top rate of fifty-five cents an hour more than a grade 1 electrical and radio.

Mr. Foote: I have no further questions. Do you want him any more?

Mr. Gilden: Just one second.

Recross-Examination, by Mr. Gilden

Q. Mr. Windsor, were you here when Mr. Green testified? A. Yes.

Q. Did you hear him testify there were news clippings in his file at the time he talked to you? A. At the meeting in Mr. Peck's office?

Q. Yes. A. Yes, sir.

Q. Do you know when those clippings were placed in his file? [588] A. I'm not sure there were clippings in the file, Mr. Gilden. Mr. Green testified to that, I didn't.

Q. Do you recall whether there were or there weren't? A. I don't recall.

Q. You don't know? A. No, sir. I do recall some other things about that, though.

Q. About what, sir? A. About that file, and Mr. Green's testimony that he saw a clipping in the file.

Q. All right. As manager of Personnel, is it standard practice if persons are mentioned in the newspaper in some way to clip the item out and place it in his employment file? A. No, sir. It is not a standard practice.

Mr. Gilden: No further questions.

Mr. Foote: No further questions, Your Honor.

(Witness excused.)

Mr. Foote: Your Honor, Mr. Gilden and I have stipulated that Defendant's Exhibit F, which is a complete copy of Mr. Green's convictions, may be received in evidence, a complete copy of the file.

The Court: Very well.

ROBERT C. KRONE

was called as a witness, and being first duly sworn to tell the [589] truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Foote

Q. State your name for the record, please, sir? A. Robert C. Krone.

Q. Where do you live, Mr. Krone? A. 13 Clayton Terrace, Frontenac.

Q. What is your business, sir? A. I am employed by the McDonnell-Douglas Corporation.

Q. For how long have you been so employed? A. Since 1941 when it was McDonnell Aircraft Corporation.

Q. McDonnell-Douglas is a successor to McDonnell Aircraft Company? A. Yes, sir.

Q. What are your responsibilities now? A. Corporate Vice President of Personnel.

Q. What were your responsibilities in 1964 and 1965? Describe your job and its duties. A. I was Vice President of Personnel at McDonnell Aircraft Corporation, and as such I was ultimately responsible for the administration of all personnel practices, programs, creation of policy and implementation of same.

Q. How long had you had such responsibilities during those years? [590] A. As a vice president?

Q. Yes, sir. A. Or as head of Personnel?

Q. As head of Personnel at McDonnell? A. Approximately eight years.

Q. Mr. Krone, are you familiar with the phrase totem pole as it was used at McDonnell? What does it mean? A. It is a ranking used primarily with our engineering forces but in some other departments throughout the company where individuals of like classifications or similar duties are ranked from top to bottom based upon their over-all performance and ability.

Q. How long has the totem pole practice been in effect at the company? A. For the purposes of rate reviews and things of that sort?

Q. Yes, sir. A. Oh, from the beginning of time as far as I can recall; twenty years, at least.

Q. Is it done twice a year or was at the time in 1964? A. It is for the non-exempt hourly personnel because these personnel are non-union personnel and are reviewed for wage considerations twice a year. For the salaried personnel it is done annually, because they are reviewed for salary con- [591] sideration once a year.

Q. Do you know Percy Green? A. Yes, sir.

Q. When did you first meet him, sir? A. In 1964, August.

Q. Under what circumstances? A. I believe that he asked to have an audience with me relative to the fact that he was being considered for termination or layoff because of a termination of the work project that he was working on, and he thought there was some degree of prejudice concerning this layoff, and that he wished a higher audience appeal.

Q. Can you pinpoint more accurately when this first meeting with Mr. Green took place in relationship to the layoff? A. It was the day before the layoff actually occurred, it was on a Thursday.

Q. Where did the meeting take place? A. In my office.

Q. Who was present? A. I believe just Mr. Green and myself.

Q. How long did the meeting last? A. Three hours; two to three hours.

Q. What did you say and what did he say, Mr. Krone? A. Well, I listened, primarily. As I said, he reviewed [592] the circumstances of the situation. It was a detail that would not have come to my attention had he not called it to my attention. Layoffs are fairly routine in a company of that size. He indicated that in this particular instance he felt that he was being singled out for layoff, along with several others, because of his race, and that he wished to appeal to some higher authority to see whether or not these charges were not true. He felt that others should be laid off before he was to be laid off. Generally, as I said, I listened and was sympathetic, and I think wound up the meeting assuring him that I would personally review the situation to make sure that any of the charges that he was making were either true or were not substantiated, and suggested that he return to my office the following afternoon.

Q. Between the time of that meeting and the following afternoon, did you do anything as a result of this conversation with Mr. Green? A. Yes, I did.

Q. What did you do? A. I checked various levels of supervision. First I checked the circumstances to see what was occurring and where it was occurring and the reason why it was occurring. I checked with supervision, his direct supervision——

Q. Did you give them any instructions? What did you tell [593] his direct supervision? A. After asking a lot of questions the final statement was, the final question was, under the circumstances that we are faced with today, if Mr. Green were a white man would he be laid off? And the answer was, yes he would be. That question was asked of Mr. Sinecki, it was asked of Mr. Peck who was the general manager of the division. It was asked of Mr. M. G. Walker who was then the technical director for administration and reports directly to the Vice President for Engineering.

Q. Was the answer the same? A. The answer was the same.

Q. Prior to this first meeting in August of 1964, had you heard Mr. Green's name mentioned? A. No, sir.

Q. Were you aware of any public activities that he may have been engaged in? A. Not prior to that, I wasn't conscious of it.

Q. The question is before the first meeting do you remember that you had heard about him or were aware of him? A. I didn't relate anything to Mr. Green, no, sir.

Q. Did you have another meeting with Mr. Green? A. Yes, sir.

Q. When was that? [594] A. The next Friday, the day after.

Q. Where did it take place? A. In my office.

Q. Who was there? A. Mr. Windsor, myself and Mr. Green.

Q. How long did the meeting last? A. About three and a half hours.

Q. Was this the day of the layoff? A. Yes, sir.

Q. What was said at the meeting? A. I informed Mr. Green that I had investigated the details concerning the layoff, and I was regretful that the facts were such that I was satisfied that there was no evidence of racial discrimination; that I was sorry that the layoff had to occur, there were others that were going out with him. We reminded him, or I reminded him of the fact that he had been told when he took this job that there would be an end to it, this being the wiring of one Gemini simulator. There was no follow on work on that particular project, and that whether or not work would be available for the crew of people that were moved into this work on the simulator would follow on afterwards was problematical. He acknowledged that he had been told this. His response was, however, that he felt he was qualified to do other work within that department. It became a [595] philosophical discussion as to whether or not it was good business to take those people who had been working on other products and lay them off and put another person who had never worked on those products on that work, as to whether or not that was good business judgment. Obviously, I took the position that it was not good business judgment, and Mr. Green took the position that he felt it was only fair that he should get that work. He did indicate that he was employment committee chairman of CORE and as such he felt that he had, in his mind, extra protective right with reference to job tenure. We discussed, I guess, after the facts were bared, a great deal of philosophy with reference to the rights of people, the rights of Negroes and the rights of racists.

Q. What did you say about the rights of Negroes and the rights of racists? A. I said that we had practiced since 1941 the equality of rights of racists and people based on capabilities of the individuals. This had been the original practice and philosophy and the thesis of this company,

and that we had continued that particular practice and would continue it.

Q. Was anything else said at the meeting that you recall? A. Yes. I think Percy was disappointed. I mean Mr. Green was disappointed and upset, because I do feel, and I must say [596] this sincerely, I was sympathetic to his position on Thursday; and perhaps he felt that I would some way or another find an answer to keeping him on the payroll. Believe me, if I could have I would have.

Mr. Gilden: I object to that, Your Honor. That is what he told him, that is just conjecture at this point.

Q. (By Mr. Foote) Was this part——

The Court: Proceed.

Q. (By Mr. Foote) Was this part of the conversation? A. Yes, sir.

Q. Was anything else said at this second meeting? A. Yes.

Q. What? A. Mr. Green indicated that he had lost patience with the white man; that the white man's words were not sufficiently good; his deeds were the only things that counted. I had suggested to him that every effort would be made to review other areas of the company in more detail for him and the others that were going out the door with him. He said he didn't feel that was good enough, so those were words, they weren't action or deeds; and that perhaps he would have to take matters into his own hands. And when asked what he meant by that, he said he really didn't know, but he might have to take some action, whatever it would be would come to him at a [597] later time. I suggested to him that I would hope that he would have some faith in me and some faith in the management of the company and give us a chance and not to behave in any manner that would reflect on him and hinder my opportunity for finding work for him elsewhere in the company.

Q. Mr. Krone, you have been in the company for some twenty years or so, is that right, sir? A. About twenty-six.

Q. Twenty-six years? Have there been other free enterprise employees laid off during your period of time?

Mr. Gilden: I object to that, that is irrelevant to this lawsuit.

Mr. Foote: I think it is relevant, Your Honor. I will tie it in.

Mr. Gilden: I am sure there have been people laid off.

Mr. Foote: All right, let's stipulate to that. You don't have to answer it. Fair enough?

Mr. Gilden: I am not stipulating.

Mr. Foote: All right, I thought that is what you said. Leave the question then.

The Court: Well, I am sure there have been.

Mr. Foote: OK.

Q. (By Mr. Foote) Is there a custom and procedure that [598] is followed with free enterprise personnel as distinguished from union personnel who are laid off, a procedure in regard to calling them back should other work develop? Is there such a customary practice at the company? A. Well, there is a distinction between the two. The union contract stipulates and specifies the methodology which is used in calling back union people.

Q. Um hum? A. When work in their classification is—when the work in their classification requires more people.

Q. My question is about the free enterprise people? A. In the area of free enterprise personnel an informal policy of call-back is utilized, whereby those people who have a mixture of basic capability and performance on their jobs and job tenure are given first preference. Others who don't meet necessarily the higher criteria that I have just set forth, are not called back.

Q. Referring to the period immediately after August 1964, do you recall whether the work force was increasing or decreasing? A. Repeat the question. 1964?

Q. Let me limit the question to the work force as it was composed of technicians?

Mr. Gilden: Your Honor, I am going to object to that. I am sure there are records at McDonnell Company which would [599] reflect whether it was going up or going down. I have nothing to cross-examine on here. It is only a statement of the Vice President in charge of Personnel. I am sure their records reflect that.

The Court: Do you have some records in 33?

Mr. Gilden: Yes. I think as two—you can use those, certainly.

Mr. Foote: I will withdraw the question.

Q. (By Mr. Foote) During your investigation of Mr. Green's allegations, as part of that investigation did you find out that any effort had been made to find him employment elsewhere before he left the company? A. Yes, sir.

Q. Had it been made? A. Yes, sir.

Q. Do you know Peter Robertson? A. Yes, sir. No, I don't, I have met him, I don't know him.

Q. Did Mr. Robertson investigate the complaint that Mr. Green subsequently filed about discrimination with the Missouri Commission on Human Rights? A. Which one? The first in 1964?

Q. The 1964 complaints, yes. A. Yes, he did.

[600] Q. Did you meet with him during his investigation? A. Yes, sir.

Q. When, approximately, was that investigation? A. September or October of 1964.

Q. During that investigation of Mr. Green's complaint, did you at any time make a statement to Mr. Robertson to this effect, or words to this effect, "Whom are you going to believe, an unemployed Negro or a white personnel director?" A. I did not.

Q. Are you absolutely sure of that? A. Yes, sir.

Q. When did you first meet Mr. Robertson? A. In the fall of 1963.

Q. Under what circumstances? A. He was investigating the first charge of discrimination filed against McDonnell Aircraft Company by the Missouri, I mean through the Missouri Human Rights Commission.

Q. Where did that first meeting take place? A. In my office.

Q. What was the substance of the charge which he was investigating? A. A Negro trainee and a white trainee were discharged for beating the clock, which is terminology used in the shop.

Q. What was the man's name?

[601] Mr. Gilden: I am going to object to that. It has nothing to do with this lawsuit.

Mr. Foote: It certainly does, Your Honor. There has been a statement made by a witness in this court that this man made an allegation during the investigation of Percy Green. The clear implication was that this statement was made about Mr. Green's complaint and Mr. Green's problems, and it was used and admitted here as an admission against interest. I have every right to ask him to explain the real circumstances, or his recollection of the circumstances of that statement and how it was made. It is a perfectly proper line of questioning.

The Court: Proceed.

Mr. Foote: Could we have the question, please?

(Question read by the reporter as follows:
Q. "What was the man's name?")

A. The plaintiff, the man making the charge?

Q. (By Mr. Foote) Yes, sir. A. His name, it was a Negro name, Hosea French.

Q. What was said during this meeting with Mr. Robertson? A. In the course of the investigation there were denials of fact. The complainant denied or rather stated that "everyone did this" and he was the only one that was selected to be discharged.

Q. This was Mr. French who had said this? [602] A. Yes. I took the position with Mr. Robertson that that would be rather ridiculous if some eighteen thousand people did it, we would have a chaotic situation.

Mr. Gilden: Your Honor, I don't know what this witness is referring do. Did what? Did it.

Mr. Foote: He explained.

The Witness: Beating the clock.

Mr. Foote: Beating the clock, Mr. Gilden.

Mr. Gilden: Oh, beating the clock.

The Witness: Would you like me to define that?

Q. (By Mr. Foote) Yes, please define that. A. I started to; in shop lingo that means leaving your work early so that you can line up at the clock at the moment the whistle blows and not have to be last in line. I would like to again repeat you can imagine what eighteen thousand people would be like lining up leaving their work place, when the rules and regulations stipulate that a man stay at his work place until the whistle blows.

Q. During this meeting what did you say to Mr. Robertson? Continue with your answer, please. A. Well, he said that there was a denial on my side that everyone did this,

and that this individual was the only one that was singled out. And it was a question of, well this is what Mr. French says. And I said something like, well Mr. French [603] has everything to gain. It is quite obvious that he might say a thing of this sort. But under the factual circumstances and seeing the business atmosphere under which we work, which word would you take, that of an unemployed Negro who has everything to gain or that of a member of management?

Q. This conversation and this statement you have just related took place a full year before our meeting with Mr. Robertson concerning Mr. Green's first complaint? A. Just about, yes.

Q. After the layoff of Mr. Green in August of 1964, did you in your capacity as the head of personnel at McDonnell, receive any reports about his activities? A. Did I hear about him?

Q. Yes, sir. A. Yes.

Q. What were those reports? A. I think shortly after his termination, it was either—there was some news media announcement or articles or radio reports or TV reports relative to his dismissal and his charges of discrimination. That was probably the first time I heard about him [Later on I heard about it rather resoundingly from my boss, the Chairman of the Board of the company, who wanted to know why a group of Negro and white people were picketing at the entrance to Glenview Road in Ladue, which happens to be [604] the entrance to the area in which Mr. McDonnell lives]. That information was reported daily to me for whatever period of time they were there, and I think it was some ten days or two weeks.

Q. Was Mr. Green involved in those reports? A. Yes, sir.

Q. Did he come to your attention? A. Yes, sir.

Q. In connection with the picketing of Mr. McDonnell's house? A. Yes, sir.

Q. Did you receive any other reports about Mr. Green's activities? A. I—Perhaps the most significant thing was the report that we received from police authorities that there was to be an intended——

Mr. Gilden: Your Honor, I will object to this. It may be in line with what was permitted before over my objection with respect to any police reports to Mr. Krone.

The Court: Proceed.

A. We received information from police authorities that Mr. Green was organizing a demonstration, probably to take the form of a massive stall-in, for the purpose of obstructing traffic and preventing McDonnell employees from getting to work [605] on a given shift.

Mr. Gilden: Your Honor, you haven't ruled on my motion in this matter. I have filed an objection here to this testimony.

The Court: I have overruled it. It is the same objection you made on the other two questions?

Mr. Gilden: Yes, I just wanted to have a ruling on it.

Q. (By Mr. Foote) For clarification, these are reports that came to you as part of your responsibilities as head of personnel at McDonnell? A. Yes, sir.

Q. OK. You may continue with the report. A. The information became more specific as time went on to the point where the date, time and place——

Mr. Gilden: Is it understood that my objection relates to all of this, Your Honor?

The Court: Yes. It may go to all of it.

A. (Continuing) Inasmuch as the date, time and place had been pinpointed and we had been so advised by the

police authorities, the occasion of the stall-in, parts of it, I happened to have witnessed.

Q. (By Mr. Foote) Where were you when you witnessed it? A. I was at several locations around the premises.

[606] Q. What time of day was that, sir? A. This was between 5:30 and 7:00 in the morning.

Q. What did you see? A. I saw cars stalled and traffic congestion and the police comandeered auto wreckers, lifting or pulling or towing stalled cars off the roadway, the arteries into the plant gate. I saw representatives of the State police, the County and the City police, such as Berkeley, Robertson and so forth, on the scene. I did not see Percy Green. I saw a delay of automobiles getting into their parking lots after their normal shift times. And that is all I personally saw.

Q. Did you later hear a report concerning Mr. Green's activities on the day of the stall-in? A. Yes.

Q. What was that report? A. It was reported that he was arrested and later was——

Q. I am just asking about the report of his activities that day. What did you hear he did? A. That he stalled his car on an artery headed toward one of our gates and was arrested for failure to remove the car, or to start the car and remove it from a stalled position.

Q. Do you remember where the report said his car was stalled? A. On Brown Road.

[607] Q. Where in relation to Highway 70? A. North of Highway 70.

Q. Between Highway 70 and the McDonnell Plant? A. Yes, close to the McDonnell Plant.

Q. Do you ever have occasion to drive over Brown Road?

Mr. Gilden: I am going to object to that. He didn't

see Mr. Green that day, he doesn't know where the car was.

Mr. Foote: I didn't ask him where the car was.

Mr. Gilden: You are testifying where the car was.

The Witness: You asked me what the reports were that I received; I am responding.

Mr. Foote: Mr. Gilden, it is the same line of questioning. He testified quite clearly, I thought, that he did not see Mr. Green. Now I am asking about the reports he got.

Q. (By Mr. Foote) Do you ever have occasion to drive over Brown Road, that section between Highway 70 and McDonnell? A. Yes, sir.

Q. How often? A. Whenever I come downtown; I come downtown once or twice a month.

Q. During 1964 and 1965 was that the same number of times a month? A. Approximately.

[608] Q. You are familiar with the stretch of road, are you? A. Yes, sir.

Q. Can you estimate how far it is from Highway 70 to the first facility of the McDonnell Company? A. Approximately a mile.

Q. After this day of the stall-in did you receive any further reports about Mr. Green? A. Yes.

Q. What? A. That he had been fined for obstructing traffic in this particular stall-in on that day.

Q. After that, any further reports? A. Yes. A report that he and members of the then formulated ACTION Committee of which he was reported to be chairman, had demonstrated in front of Union Electric Company's Building and in front of the Roberts Building downtown.

Q. Do you remember approximately when that was, sir? A. It would be sometime subsequent to the stall-in. I would guess perhaps spring of the following year.

Q. What was reported to you that was done in that demonstration? A. That members of the demonstrators, the ACTION Committee apparently, at least that seemed to be their identification, had chained and locked the front door of the Roberts [609] Building, the exit door. This building happened to be occupied predominantly by McDonnell employees. And this locking and chaining of the door occurred at the end of the shift, so that people were unable to get out in a normal fashion.

Q. At that time did you know or was it reported to you whether Mr. Green had an office with ACTION? A. I think it was reported that he was chairman of the ACTION Committee.

Mr. Foote: Just one second, please.

Q. (By Mr. Foote) Did Mr. Green, to your knowledge, subsequently apply for employment at McDonnell? A. Yes, sir.

Q. Approximately when was that? A. July of 1965.

Q. How did you hear about it? A. I was called on the day that he applied. I don't know by whom, either by Mr. Windsor or by one of his subordinates. I'm not sure—Windsor and I were perhaps even together at that time. Our offices are right adjacent to each other, and we have the same telephone station numbers. A call came through, as I recall, to Mr. Windsor, and he happened to be in my office, I believe. Anyway, we have desk sets where we can press a button and everybody can hear. And the report was that Mr. Green was applying for a job for [610] mechanic and electric radio for grade 2 or 3 for which we were advertising at that time. And——

Q. (Interrupting) Excuse me. You had need of people in those grades at that time? A. Yes, sir. And it was the

subordinate employment department's immediate opinion that he should not be hired. However——

Mr. Gilden: I will object to that, Your Honor, unless he pinpoints the name of the subordinate.

A. I will pinpoint the name of the subordinate. The name of the subordinate first was Mr. Monroe Johnson, the interviewer.

Q. (By Mr. Foote) Was that what he told you? A. No, Mr. Raymond Coletta, who happens to be the employment manager, who is a subordinate to Mr. Windsor.

Q. Is that what they told you? A. Yes, sir. It was their opinion that he should not be hired, were there any instructions to the contrary.

Q. What instructions did you give? A. The instructions were that as far as we were concerned, he had disqualified himself as a desirable employee by reason of the stall-in, and to be polite and courteous and say if there was work to be found where he could be used, he would hear from us.

[611] Q. So the decision was made that he would not be hired? A. That is right.

Q. And the reasons for that decision were? A. The reason for my final confirmation of the subordinate's decision——

Q. (Interrupting) I am asking just for your decision now. A. It was based on the stall-in which was interpreted by myself and my management as an overt act to disrupt the normal activities of our company tantamount to sabotaging our plant.

Mr. Foote: No further questions.

Cross-Examination, by Mr. Gilden

Q. Mr. Krone, how old are you? A. Fifty-two.

Q. You live at 13 Clayton Terrace in Frontenac? A. Yes, sir.

Q. That is an all-white community, isn't it? A. No, sir.

Q. Is there a black person living there now? A. There are black persons that live within two hundred yards of my home.

Q. I see. What kind of dwellings do they live in? A. Do I live in?

[612] Q. Do they live in? A. What do you mean?

Q. Are they big dwellings or small dwellings? A. They are small dwellings.

Q. You live in a big house? A. Not by some standards; what do you call a big house? I have four children.

Q. How many acres do you have? A. About two.

Q. Where did you go to school? A. College?

Q. Yes. A. Dartmouth College, New Hampshire.

Q. Where did you grow up? A. New York; Westchester County, New York.

Q. That is a suburban community of New York City, correct? A. Yes, sir.

Q. Did you go to grade school and high school there? A. Yes, sir.

Q. Westchester is considered a rather rich community, is it not? A. It depends on whether you have money; I don't know.

Q. You didn't have any money? A. No, we did not. I worked for a year before I went to [613] college and worked my way through college.

Q. I see. How far did you go to Dartmouth, did you finish? A. Yes, sir.

Q. Did you get any graduate degrees? A. No, sir.

Q. Do you have a bachelor's degree? A. Yes, sir.

Q. Now you have been employment vice president since what year? A. I have been an employment vice president or Vice President of Personnel since about 1960.

Q. 1960? Do you know—you have, I am sure you have supplied a great amount of data to the Federal Government, do you not at the present time with respect to the numbers of blacks and whites in employment at McDonnell-Douglas Corporation? A. We supply an annual report by reason of executive order.

Q. What executive order is that, 10725? A. You give me the number of it, I don't know.

Q. I see. Do you supply figures to the Equal Employment Opportunity Commission? A. Yes, sir.

Q. Do you supply figures to the Department of Labor? [614] A. Not to my knowledge.

Q. Do you supply figures to the Office of Contract Compliance? A. You are talking about what figures now?

Q. Blacks and whites? A. The Labor Department, not to my knowledge.

Q. The Office of Contract Compliance? A. Yes.

Q. Any other governmental agencies? A. On a routine basis the only two I am aware of is E.E.O.C. and O.F.C.

Q. How long has this been going on with E.E.O.C. and the Office of Federal Contract Compliance? A. The names of these bodies change so rapidly, prior to the O.F.C. it was the President's Committee on Equal Employment Opportunity. That started about 1958, on a formalized basis.

Q. And you have been supplying figures to the Office of Federal Contract Compliance since 1958 on blacks and whites? A. That became a successor organization.

Q. Since 1958 you have had those figures have you not, sir? A. Yes.

Mr. Gilden: May I have the file, Your Honor?

[615] Q. (By Mr. Gilden) Do you recall signing an affidavit filed with the Federal District Court here as to the amount of time it would take to get these figures together of blacks and whites? A. No, sir.

Q. You don't recall such an affidavit filed with this court?

Mr. Foote: I think if we are going to talk about the affidavit, Your Honor, I will object on the basis we should have the affidavit in front of Mr. Gilden, the Court and the witness, and the matter that was before the Court at the time this affidavit was made. The questions that are being asked here about reports made to various government agencies, and the implication, as I understand the question, the affidavit was made on a different subject, the implication is that it was somehow a false affidavit. If we are going to ask the questions, let's use the affidavit.

Mr. Gilden: Your Honor, this is cross-examination. He can go into it if he desires to on redirect or whatever else. I will show him the affidavit. I am trying to locate it.

The Court: Show him the affidavit, then ask him about it.

Mr. Gilden: I will; I will be happy to.

[616] The Court: We will take a brief recess while he is looking through the file.

(Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Q. (By Mr. Gilden) Mr. Krone, the question of the monthly number of total work force employed by Mc-

Donnell Corporation, St. Louis, City of St. Louis, St. Louis County, from January 1st, 1961 to date, do you hear that? How long would it take to get that information? A. The monthly average, is that what you are talking about?

Q. Not the monthly average, the monthly number. A. The first of the month, the end of the month or the 15th of the month?

Q. Any way you want to do it. Whatever figures you have got available. A. We wouldn't have those figures available on any particular source document at the moment. They would have to be dug out from past records.

Q. How long would it take you to get them? A. I wouldn't have the slightest idea. Considerable man hours, I think.

Q. Would it be over an hour? [617] A. Probably about a week.

Q. About a week to get that? A. I don't know how many people, probably several hundred man hours of work.

Q. All right. Then separately the monthly number of whites and non-whites on each of the classifications for the same thing, January 1st—Are they broken down into blacks and whites? A. Not the monthly figure.

Q. They are not? Are they broken down yearly? A. From when?

Q. The question here was from January 1st, 1961. A. I would like to respond to that by reason of my answer to your earlier questions. When we were reporting to these federal agencies which you asked about, we were reporting as of a given payroll period and stipulated by these agencies.

Q. Give me the payroll period. A. It has changed over the years, but it is usually the payroll period closest to the 15th of December of the given year.

Q. All right. How long would it take you to get that information which you supplied to the Office of Federal Contract Compliance? A. Do you know what that information is? May I explain [618] what the information is?

Q. Certainly, go ahead. A. It is a list of about seven or eight work categories, starting with managers down to unskilled level.

Q. All right. A. One in the left-hand column. Horizontally across the top of the page are headings such as total work force, white, black, other, male, female, white, black, other, and total personnel.

Q. How is it broken down? A. You mean the work categories?

Q. Yes. You have it according to work categories on a monthly basis? A. No. That has a given payroll period. I told you one date.

Q. As of a payroll period on a particular date? A. Right.

Q. Would it be from one payroll period to another, is that what you are saying? A. It would show what you reported last year for that same payroll period and what you reported this year.

Q. It is almost a fiscal type thing, from payroll period to payroll period, right? A. It would be the number of people on the payroll as of [619] that date.

Q. All right. That would be one set of figures, then you would have a set of figures for the payroll period a year prior, right? A. That is right.

Q. And then a year subsequent? A. Right.

Q. How fast could you get that information? A. Probably it would take us sixteen to twenty-four man hours.

Q. To pull it out of a file? A. Not to pull it out of a file, it has got to be machined, it has got to be machine

taped, it has got to be programmed. We are talking about thirty-three thousand people.

Q. I am not asking for one that you are to supply, I am asking for the one you supplied the Government. A. That is right.

Q. You mean you didn't have that available on file some place, a copy of it? A. How can we have it in a file if we have to wait to a certain date before we can come up with the information?

Q. Well, sir, either you or I are confused.

The Witness: I think you are.

Q. (By Mr. Gilden) I am confused, sir? All right. Now, [620] these interrogatories were served on October 24th, 1968. Let's take the period from 1962, payroll period 1962 to the payroll period in '63 as an example. Let's take '62 to '63, '63 to '64, '64 to '65, say, three years. Obviously, they had already been prepared, hadn't they?

Mr. Foote: What had been prepared?

Mr. Gilden: He has testified he supplied those.

Mr. Foote: Are you asking about the reports he made to the Government or are you asking about the specific information you asked for in these interrogatories?

Mr. Gilden: I am asking about what he prepared.

Mr. Foote: I thought you were asking about the interrogatory.

Mr. Gilden: I think it is clear, Your Honor.

The Court: It isn't clear to me, Mr. Gilden. As I understand his testimony——

Mr. Gilden: All right. Maybe——

The Court: As I understand the testimony, he testified that he has at the end of each payroll period the number of whites and blacks and so forth, on that payroll.

Mr. Gilden: That is correct.

The Court: Is that what you are asking for?

Mr. Gilden: That is all I am asking about.

The Court: You started to ask him about the [621] interrogatories.

Mr. Gilden: No. I didn't ask about that.

The Court: Go ahead.

Mr. Gilden: I just wanted to get the date. That was the date I served them. He had asked me—there was some confusion—Let's go back again so there is no confusion in the record.

Q. (By Mr. Gilden) In the year 1968 you had supplied to the Government the figures of a payroll period date of blacks and whites and total work force, is that correct? A. Yes, sir.

Q. That is all I am trying to get at. A. OK.

Q. You would have supplied one for the year, some payroll period in '62, a certain payroll period in '63, and a payroll period in '64, and a payroll period in '65. A. Yes, sir.

Q. And they had heretofore been supplied, right? A. Yes, sir.

Q. That is all I am trying to get. Do you understand my question now? A. Right.

Q. Wouldn't those figures be in a certain file, those copies? [622] A. Yes, the past history, but not——

Q. (Interrupting) That's all I'm asking. A. (Continuing) Not the 1969 figures or the 1970 figures.

Mr. Gilden: That is not what I was asking about.

A. OK.

Q. I just said that you did have '62, '63, '64 and '65 in a certain file? A. In that particular report, yes.

Q. That is what I am trying to find out. A. Yes.

Q. That is available, isn't it, sir? A. I presume it is, yes.

Q. How long would it take you to get that? A. An hour.

Q. That was broken down by job classification? A. No.

Q. How was it broken down? A. Broken down by functional classifications.

Q. Like what? A. Managerial, sales, professional, technical, clerical, skilled, semi-skilled, unskilled; to the best of my knowledge. I think maybe I missed a category.

Q. You would have it all broken down and you would have whites, blacks and others, and the others could be Chinese? [623] A. Orientals.

Q. Orientals? Things like that? OK.

The Court: Mr. Gilden, so that I understand it, that is not what you asked him for in the interrogatories, is that correct?

Mr. Gilden: In the interrogatory, Your Honor, I think I asked for the total for the work force monthly from January, I think 1-61 to date of total work force, I believe; then I asked it to be broken down into blacks and whites and also job classifications.

The Court: All right.

Mr. Foote: I would invite the Court's attention specifically to the interrogatories that were filed previously in this case that were at issue. At the time there was testimony and an affidavit filed. I would also invite the Court's attention in regard to this question, to the de-

mand for production and inspection of documents which was previously filed in this case, about which there was a great deal of discussion, and also testimony and an affidavit. I will state now that the information that was filed with the Government, as I interpret the interrogatories from their face and the demand for production and inspection is totally different, and I would state also for the record that Mr. Gilden in a deposition of Mr. Krone asked these very same questions of him [624] a long time ago and got the answers, yes, we have got these documents, yes, we have got these figures. And to my knowledge, correct me if I'm wrong, Mr. Gilden, not once has there been a demand made for those documents or those figures. Now, if there had been such a demand made we could have taken it up at that time for those documents, but he never asked for them.

The Court: Proceed, gentlemen.

Q. (By Mr. Gilden) Mr. Krone, as Vice President in charge of Personnel, you compile a great number of figures, do you not? A. Do I?

Q. Yes. A. No.

Q. You don't? A. Do I personally?

Q. It is given to you, I mean under your supervision and control, statistics. A. Relative to what?

Q. Well, to statistics of census figures and things like that. I mean population. A. Within our plant?

Q. Yes. Within—I mean under your supervision and control. A. The numbers of people we have working for us and [625] things of that type?

Q. Yes. A. Yes.

Q. Things like that? A. Yes.

Q. You also have compiled for you what the census figures are for the Metropolitan St. Louis community? A. Not necessarily, no.

Q. Do you know what the population of blacks were in the Metropolitan St. Louis community for the census in 1960? A. No. I would guess about fifteen per cent.

Q. Around fifteen per cent? A. Are you talking about Metropolitan St. Louis or the County?

Q. The Metropolitan St. Louis community, about fifteen per cent? A. I would guess perhaps but I don't know.

Q. Now, you have stated that the policy of McDonnell-Douglas since you have worked there, and that is what, 1941 or thereabouts? A. Right.

Q. Has never been to discriminate against blacks, is that correct? A. That is correct.

[936] Q. That has been the policy of the company? A. Yes, sir.

Q. And you know that to be a fact? A. Yes, sir.

Q. I will have you read, sir, to the Court tab 30 of Plaintiff's Exhibit 33, the per cent of non-whites beginning in 1943, and I would assume non-whites to be at that time designated as blacks, Orientals and Indians. A. You want me to read it?

Q. Certainly. A. (Reading) Three point two three.

Q. (Interrupting) Give us the year and the percentage. A. (Reading) 1943, three point two three. Total non-white hired, four point one one. 1944, three point two five, per cent non-whites hired, five point one three.

Q. I am sorry, I'm not getting your figures. You are reading one figure then another, what are you saying? A. These are the people on the payroll. These are the people of non-whites hired.

Q. The first figure you gave us is the figure on the payroll, the second figure the non-whites hired? A. Yes.

Q. Let's start with '43 again, so we get this correct. A. (Reading) Three point four three and four point one

[937] one.

Q. All right. A. Three point two five and five point one three. I am going consecutive, I don't see that it is necessary to repeat the years, is it? Three point six nine for '45 and four point 0 six. One point four 0.

The Court: Wait a minute. This is not making any sense to me and I am sure it is not making any sense for the record. We have the exhibit in evidence, isn't that right?

Mr. Gilden: Right.

The Court: All right. Why don't you ask him a specific question relating to that tab on McDonnell and his testimony so that we know what you are talking about, Mr. Gilden?

Mr. Gilden: Well, Your Honor.

Q. (By Mr. Gilden) Mr. Krone, this has already been introduced in evidence; is the total non-white employment of McDonnell-Douglas for the years 1943 through September of 1964? A. Yes.

Q. Is that correct, Mr. Krone? A. It looks like it, yes.

Mr. Gilden: Now, Your Honor, Mr. Foote has asked a question as to whether McDonnell-Douglas discriminates against blacks and Mr. Krone testified that since 1941 they have not and that has been the policy of the company.

[635] The Court: I understand that. I am sure what you want to show and that is why I want you to get it in the record so that it is understandable.

Mr. Gilden: All right.

The Court: You have the exhibit. Now ask him the question.

Q. (By Mr. Gilden) Mr. Krone, I will show you what has been marked as Plaintiff's Exhibit 33, tab 30, and ask you

the highest peak of percentage of non-whites on the payroll from the year 1943 through September of 1964.

Mr. Foote: Mr. Gilden, I gather the question is for him to read the exhibit?

Mr. Gilden: Right.

Mr. Foote: Not testify from his own personal knowledge?

Mr. Gilden: From the exhibit itself.

Mr. Foote: He is to read from what is in evidence?

Mr. Gilden: That is correct.

The Witness: I am reading from the exhibit, 1963, five point four three per cent on the payroll, seven point one five per cent hired.

Q. (By Mr. Gilden) What year was that, sir? A. 1963.

Q. Give me the lowest percentage on the payroll and the [629] lowest per cent hired from examination of that document and in what years? A. From this document?

Q. Yes, sir. A. 1946.

Q. What was the percentage on the payroll? A. One point four O on the payroll; point six two hired.

Q. What year? A. 1964. I might add that was at the conclusion of World War II. We were lucky to have anybody working for us at that time.

Mr. Gilden: I am going to object. That is not responsive to the question.

Q. (By Mr. Gilden) Now, Mr. Krone, you have testified that there was a policy about hiring people that were laid off, is that correct, trying to find other jobs for them? A. There is a policy of trying to find jobs wherever possible to prevent layoffs if possible, and to get them back to work as quickly as possible, wherever possible.

Q. You did, did you not, give Mr. Robertson some material that he took back with him? A. I am quite sure I did. He was there for a long time.

Q. That was in relation to Mr. Green, is that correct? A. I am quite sure we probably did, yes.

[630] Q. I mean you testified about Mr. Robertson appearing when there was another black employee by the name of Hosea—— A. French.

Q. French; but you haven't gone into the testimony about your meetings with Mr. Robertson with respect to Mr. Green. Did you supply him with material when he came in about Mr. Green? A. I am sure either I did or members of my staff did.

Q. All right. I will hand you what has been marked as Plaintiff's Exhibit 33, tab 16, and page 3 titled Laid Off Hourly F.E.P. What does F.E.P. stand for? A. It is a cliche phrase meaning free enterprise or non-union people.

Q. Would that be the classification that Percy Green was in at the time of his layoff? A. Yes, sir.

Q. All right. Will you give us the policy statement—Strike that. Is that what you are reading, the policy statement of McDonnell-Douglas at the time of Mr. Green's layoff? A. No, these are instructions for laid off hourly employees, it is not a policy statement.

Q. Well, then, that was actually written down to be given to employees that we laid off, is that right? A. That is right.

[631] Q. Turn to page 3 there, I don't know whether Mr. Robertson underlined it or who underlined it, but on the bottom do you see some words that are underlined? A. Yes.

Q. What? A. Yes.

Q. All right. Will you read those words, please? A. May I read the paragraph, it starts?

Q. You can read any place you want to start. A. Paragraph 7. (Reading) It is with deep regret that your company was forced to make a layoff to properly balance its work force in relation to the production schedule adjustments. We are vitally concerned about your future employment and will take certain steps which may be of some help to you in getting a job: A) The Missouri state employment service will be notified of your layoff.

B) We will notify many industrial companies in the St. Louis area of the availability of this group and offering specific information as to the individual's name, address and telephone number.

C), this is the underscored part, you will be given first consideration for any future available openings at MAC for which you are qualified.

Q. All right. Now do you know what Mr. Green's classi- [632] fication was before he was a lab tech B? A. I believe he was a mechanic electric radio grade 1.

Q. All right. Now do you know when Mr. Green and some other people picketed Mr. McDonnell's home? A. Do I know when?

Q. Yes. A. Yes, I testified.

Q. When was that? A. September, I believe, 1964.

Q. How long after he had been laid off, do you know? A. Within a couple of weeks.

Q. After he was laid off? A. Approximately.

Q. All right. You have testified that efforts were made by the company to locate other employment for Mr. Green, is that right? A. Yes, sir.

Q. Do you know when those efforts started and when they ceased? A. They started——

Mr. Foote: Excuse me. Is the question other employment within the company?

Q. (By Mr. Gilden) Within the company. I am not looking for other employment outside the company. [633]

A. It started, probably, about two weeks prior to the scheduled layoff.

Q. All right. When did they cease? A. Probably at the time after the stall-in in October. I am saying probably, I really don't know. But I would say definitely they would have ceased after the stall-in.

Q. You say definitely, when do you believe they ceased? A. After the stall-in in October.

Q. Do you have anything—Strike that. You asked the company to prepare for you some documentation, did you not, of other efforts, other departments, to obtain employment for laid-off personnel, did you not? A. I don't understand the question.

Q. Did you have a document prepared for you as to what efforts were made to find employment for laid-off personnel, free enterprise personnel? A. For all laid off people?

Q. Yes. A. I don't recall that I did.

Q. Did you have one prepared for Mr. Green personally? A. I don't recall if there was; there may have been, I don't recall.

The Court: Mr. Gilden, do you anticipate there will be quite a bit more cross-examination?

[634] Mr. Gilden: I think I will have some time with the witness, Your Honor.

The Court: What?

Mr. Gilden: I think there will be some time with the witness.

The Court: We will recess until 2:00 o'clock.

(Thereupon, the Court declared a recess until 2:00 o'clock p.m. the same day, January 15, 1970, at which time court was duly reconvened, the parties appeared and the following proceedings were had:)

[635] Afternoon Session

Thursday, January 15, 1970; 2:00 O'Clock P.M.

ROBERT C. KRONE

recalled, having been heretofore duly sworn, testified further as follows:

The Court: Proceed.

Cross-Examination, by Mr. Gilden (Continued)

Q. Mr. Krone, I think before the recess I asked you what McDonnell had done in the way of looking for work for Percy Green after his layoff, do you recall that? Do you recall that question? A. Yes. You mean when it started and when it ended and something of that sort?

Q. That's right. A. Yes.

Q. And I told you I was going to look through a book here? A. Yes.

Q. Plaintiff's Exhibit 33 at tab 29 is a memorandum apparently from Mr. Waters to Mr. Garland, do you see that? A. Yes.

Q. Was that submitted to you? A. No, sir. Not to my knowledge. I don't recall that it was.

Q. You have never seen that before? [636] A. I don't know. I may have, I don't recall. I probably am familiar with some of the areas he mentions that were given to me verbally. I think this is the result of my instructions through Windsor to see that our organization used all of its possibilities and efforts to investigate chances for employment.

Q. What is the date of that memo? A. 3 September 1964.

Q. So that would have been about, based upon the layoff being on the 28th of August, that would be around six days later, is that correct? A. Um hum.

Q. Now, Mr. Krone, what did you do specifically after that date to obtain employment for Percy Green? A. What did I do?

Q. Yes. A. I didn't do anything specific except to leave instructions with my staff to investigate all possibilities for employment opportunities for those people who had been laid off and not specifically for Percy Green any more than for the other three or four that had gone out with him at that time.

Q. Do you know whether there were job openings for radio electric mechanic after September 3rd, 1964? A. Until what date?

[637] Q. I just asked afterward. A. Yes. In 1965 there were some job openings.

Q. When did that job classification open up? A. Well, it probably was job classification grade 2 and 3 in that classification; probably in the late spring and summer of '65.

Q. When you say late spring, about when? A. May.

Q. About May of 1960—— A. 5.

Q. 5? A. I am guessing at that.

Q. But you of your own knowledge do not know of any specific things that were done to help Percy Green get a job after August 28, 1964? A. September the 3rd is the date.

Q. Let's say after September 3rd, 1964? A. I don't know of anything specific that was done personally, no.

Q. OK. Now after Mr. Green was laid off, or during the period that he was going to be paid off, you asked for a review of all of his file, did you not, employment record? A. Well, I had his personnel folder with me after our meeting on Thursday, the 27th, or whenever it was in August.

[638] Q. Did you ask for communications and memoranda to be sent up to your office from various people who

worked with Percy Green as to how they treated him? A. I don't recall that I did. I think most of my investigation was oral at that time.

Q. Do you recall any communications coming from any engineers such as Mr. Hammond or any other people? A. Mr. Who?

Q. Hammond, H-a-m-m-o-n-d? A. The name is not familiar.

Q. Do you know of any people other than yourself who gave any material to Mr. Peter Robertson when he came to your office at McDonnell-Douglas to investigate the complaints of Percy Green? A. I can't testify to that. He talked to and interviewed a considerable number of people. Whether they gave him documents or not, I don't know.

Q. Well, I showed you tab 29, this informal memo of September 3rd, 1964. Could you testify whether or not you give that to him? A. I did not give it to him.

Q. You did not? A. I don't recall that I gave it to him, it is not addressed to me, it is addressed to someone else.

[639] Q. I just asked whether you gave it to him? A. I don't recall.

Q. It speaks for itself, it is addressed to Mr. D. F. Waters. I just asked whether you gave it to him. A. I don't recall giving it to him.

Q. Did you ask Mr. Sinecki to develop a report for your office as to his handling of Mr. Green's layoff? A. I think that I did, yes.

Q. Did you also ask Mr. Godefroid to do the same thing? A. I think Mr. Sinecki asked Mr. Godefroid to do it.

Q. Then they submitted material to you with respect to the people that were being laid off? A. Yes.

Q. Did you discuss the matter of the layoff with Mr. Sinecki personally? A. Yes, sir.

Q. Did Mr. Sinecki tell you when the decision was made to lay off the personnel of which Mr. Green was one. Let's say layoff, declare them surplus; I will use that. A. Did Sinecki—I had no connection with Mr. Sinecki until after my first meeting with Mr. Green.

Q. All right, that's all right. I said did Mr. Sinecki, when he talked to you, after Mr. Green talked to you? A. Yes.

[640] Q. Discuss with you when the decision was made for the declaring of the surplus of certain people on the totem pole that has been testified to here? A. I would gather that he probably did.

Q. What date did he give you? A. He didn't give me a date. He said it was a matter of probably—they were trying to hang on to these people as long as possible, and it probably was two weeks prior to the actual layoff date, but it was obvious that people were going to have to be let go.

Q. Did you tell Mr. Robertson that Mr. Sinecki told you that the date was July 15th, 1964? A. I don't recall that date. It might have been, I don't recall it.

Q. It could have been July 15th, the day that was decision day as to the people that were going to be declared surplus? A. I couldn't testify, I couldn't identify that date one way or the other.

Q. You have testified about Mr. Green talking to you on two occasions, is that correct? A. Yes, sir.

Q. After or during the course of—Strike that. Was that before the layoff or after the layoff? [641] A. Before.

Q. Before the layoff. On either of these occasions did he threaten you in any way personally? A. No, sir.

Q. Did he threaten any personnel of McDonnell-Douglas in any way in your presence? A. Not to my recollection.

Q. Did he say anything about causing any damage or injury to any property in any conversation with you? A.

I don't recall that he did. He did use the term he would take that action that he deemed appropriate.

Q. All right. Those were the words he used? A. That is paraphrasing, yes.

Q. All right. But he never indicated to you what action he would take? A. No, sir.

Q. You do know, of course, that he filed a complaint with the Missouri Commission on Human Rights? A. He told us he was going to file a complaint with that Commission, also with the O.F.C.C. and with the President's Committee.

Q. All right. And he did, in fact, did he not, file his complaint with those three agencies? A. I believe he did, yes.

[642] Q. Mr. Krone, do you know what Mr. Green pled guilty to, what charge? A. As an outgrowth of the stall-in?

Q. Yes. A. Obstructing traffic, I understand; that is what I have been told.

Q. All right. Have you, or do you know how many of your employees have been found guilty of the offense of obstructing traffic and fined fifty dollars? A. Obstructing traffic for the purpose of interfering with our operations?

Q. No, just answer that question. A. I don't know.

Q. You can explain through your attorney. A. I don't know.

Q. Do you know how many of your employees have ever been found guilty of traffic offenses? A. I don't know how many, no, sir.

Q. Is it a disqualification for employment to be found guilty of a traffic offense? A. Is it?

Q. Yes. A. On that thing alone?

Q. Yes. [643] A. No.

Q. Would the charge alone of obstructing traffic be grounds for disqualification for employment at your corporation? A. Would the charge what?

Q. Would the conviction of the charge of obstructing traffic be grounds by itself alone?

Mr. Foote: Is that question based on the evidence in this case, or is it based on the charge of obstructing traffic that has come into this case?

Mr. Gilden: Obstructing traffic; you can explain. Would that be grounds for disqualification for employment at McDonnell-Douglas? A. For the purpose of doing that, obstructing traffic for what purpose?

Q. Just blankly obstructing traffic? A. Well, I think we have to condition that. If the grounds were obstructing traffic so that we couldn't move our trucks in and out of our plant, for example, it would be ground for not hiring an individual.

Q. I would say, Mr. Krone, let's assume that you didn't have any facts—strike that. Assume that a man is found guilty of obstructing traffic on Brown Road a mile away from McDonnell-Douglas. Would that in and of itself be grounds for disqualification for employment? [644] A. It would depend on the purpose of his obstructing traffic.

Q. I am asking merely——

Mr. Gilden: Your Honor, may he answer that question? I am just asking that particular question. He can explain in further questions or in further answers he might make.

The Court: Well, he said it depends on the circumstances.

Mr. Gilden: I would like to get an answer to that one question. He can answer it.

The Court: He said it depends on the circumstances.

Mr. Gilden: I am presenting the facts that have been brought in and asked on direct examination; this is cross-examination.

The Court: Give him the circumstances and let him answer, if that is what you want.

Mr. Gilden: Merely obstructing traffic on Brown Road with no relationship to McDonnell-Douglas.

Mr. Foote: I object to the question. You have stated it is a hypothetical question. My understanding of the rules of evidence is that a hypothetical question must be hypothesized on what is already in evidence.

Mr. Gilden: It is in evidence, obstructing traffic is in evidence.

[645] Mr. Foote: Give him the hypothesis of the facts from the evidence. That is the proper hypothetical question, then I will have no objection.

Mr. Gilden: Will Your Honor rule on the question that has been asked here?

The Court: I will sustain the objection to it.

Q. (By Mr. Gilden) Do you know of any employees who have been discharged during the years 1963 or '64, because of conviction of traffic offenses? A. I do not know for that particular, for that purpose singly and only because of that purpose, I don't know.

Q. Do you know of any people that have been rejected for employment by McDonnell-Douglas in the years 1963, '64 and '65 because of conviction of a traffic offense?

Mr. Foote: I make the same objection, Your Honor. I think we are back to the same question. You are asking hypothetical questions. I do not believe it is proper to ask a hypothetical question based on facts which are not in evidence.

Mr. Gilden: That is not hypothetical, that is fact.

Mr. Foote: Weren't you asking——

The Court: Well, I will overrule the objection.

The Witness: What was the question?

Q. (By Mr. Gilden) The question is, have you refused [646] employment in the years 1963, 1964 and 1965 for anyone who has been found guilty of a traffic offense? A. I would not know whether we have refused employment.

Q. On that ground alone? A. On that ground alone. I would not know whether we have refused employment.

Q. Would that be disqualification for them, for employment on that ground alone? A. It would depend on how many traffic offenses the man had and what the rest of his character was. If he was a son of a——

Q. A son of a what? A. An individual who we all know in the city who was responsible for traffic offenses that were in the high numbers, then obviously he would probably be disqualified.

Q. I don't understand, if he is a son of a person—— A. I changed my testimony because that gets a little bit closer to the court. I will say this, if the traffic offenses were of a consequence and of a nature and of a number that showed irresponsibility or other parts of character, this would be a consideration relative to his qualifications for employment.

Q. I just asked about one offense, sir. A. I wouldn't know whether it would be or not. It would [647] depend on how it fit into the entire background of the individual.

Q. You recall, of course, talking to Mr. Peter Robertson, is that correct? A. Yes. I testified——

Q. I'm not talking about this other black fellow you talked about, I am just talking about Percy Green's mat-

ter. You recall talking to him about Percy Green's matter? A. Yes, sir.

Q. OK. Now, Plaintiff's Exhibit 33, tab 17, do you recall ever seeing that document before? A. I believe I have.

Q. Is that what is known as the totem pole that Mr. Green was on at that time? A. I don't know that it was. It could have been. That could be referred to commonly as the totem pole, that is the ranking of people in my opinion.

Q. Now, Mr. Krone, do you see any words on here that bear your signature?

Mr. Foote: His personal signature?

Mr. Gilden: Yes, his personal signature, a notation by him.

A. I don't see my signature.

Q. (By Mr. Gilden) Is this 17 Aug. Krone, is that your [648] handwriting? A. No, sir.

Q. It is not your handwriting? A. No, sir.

Q. 17 Aug. Krone is not your handwriting? A. It is not, sir.

Q. Is there anything on that page that has your handwriting on it? A. I don't recognize it.

Q. Do you recall drawing a line over Mr. Green's name when Mr. Robertson was in your office? A. No, sir. What would be the purpose of drawing a line through the name?

Mr. Foote: Mr. Krone, just answer the question.

A. I don't recall it, no, sir.

Q. (By Mr. Gilden) Mr. Krone, you are Vice President of McDonnell Aircraft Corporation, right? A. I was at that time, yes.

Q. What is your job now? A. Vice President of McDonnell-Douglas Corporation.

Q. It is really the same corporation, it merged with the Douglas Corporation? A. Yes, sir.

Q. All right. How much of McDonnell-Douglas—Strike that. [649] McDonnell Aircraft's work in the years 1964 and 1965 were federal contracts? A. I would be guessing, I would say probably over ninety per cent.

Q. Were you here when Mr. Windsor testified? A. No, sir. Well, I was when he was here this morning.

Q. Just this morning's testimony? A. Right.

Q. You have stated that McDonnell Corporation did not discriminate against Percy Green, is that correct? A. Yes, sir, because of race.

Q. Well, did they discriminate against him for any other reason? A. What is your definition of discrimination?

Q. Well, you tell me what your definition is. A. In the employment process to discriminate is to make a subjective and a purposeful judgment and decision as to which selection is better than another selection.

Q. All right. So you—Would you say you discriminated against Percy Green for some other reason? A. I am not aware of that.

Q. Do you know whether any people below Mr. Green's name on the totem pole had taken the examination and flunked it? [650] A. What examination?

Q. The test that was offered to the people that had been declared surplus? A. I do not know.

Q. Mr. Krone, if we would assume that Mr. Green did not take the examination, which you know, is that correct? A. Yes, sir.

Q. And you know that Mr. Green is black? A. Yes, sir.

Q. And we assume that an individual by the name of Graville had taken the examination and he was white and he was below Mr. Green on the totem pole which rates people, you know, and Mr. Graville flunked the examination; and if Mr. Graville remained with the corporation and work was found for him immediately and work was not found for Mr. Green, would you consider that discrimination?

Mr. Foote: I will object to that question. I don't think there is a foundation laid for it. It has not been established that this man knew either of these gentlemen. I know he is supposed to assume it, but I don't think there are enough facts for an assumption.

Mr. Gilden: Well, if you want to add any more facts——

Mr. Foote: I don't want to add any more facts, I am just objecting to the question as asked.

[651] The Court: I will overrule the objection. He may answer.

Q. (By Mr. Gilden) You can answer the question.

The Witness: Will you please repeat it?

Mr. Gilden: Will you repeat the question.

(Question read by the reporter as follows:

Q. "And we assume that an individual by the name of Graville had taken the examination and he was white and he was below Mr. Green on the totem pole which rates people, you know, and Mr. Graville flunked the examination; and if Mr. Graville remained with the corporation and work was found for him immediately and work was not found for Mr. Green, would you consider that discrimination?")

A. No, not as that question is phrased. Under what capacity did Mr. Graville stay?

Q. (By Mr. Gilden) Let's assume that he was found a job calibrating in another department? A. Calibrating what? Do you know what calibration means? You can calibrate a very highly intricate instrument and be a highly skilled individual. You can calibrate the nozzle of an oil burner, and that doesn't take much skill. Calibration doesn't mean anything to me.

Q. Did you offer Mr. Green the job of calibrating the [652] nozzle of an oil burner? A. No, we did not.

Q. Or what did you call that? A. I said an oil burner.

Q. An oil burner. You never offered him—Do you have that kind of a job? A. No. I was just using the definition of the word calibration. Your word calibration means absolutely nothing to me.

Q. You would not consider that to be discrimination? A. No, sir.

Q. Can you tell me what—— A. (Continuing) Not under the phraseology of the question you posed to me.

Q. Well—— A. (Continuing) If this man had gotten a job for which he was tested and he had flunked it, and he still got that job in that classification and Percy did not get the job because he didn't take the test, then I would say yes, that would be discrimination. Now did this man Graville, or whatever his name is, get a job as mechanic electronic? If he did then I would say that would be discrimination.

Q. Do you know where Mr. Graville obtained a job with the plant? [653] A. I don't even know who Mr. Graville is.

Q. Is this the first time you have heard the name Graville? A. This is the first time I have ever heard his name until Mr. Windsor testified about it this morning.

Q. Mr. Krone, I believe the testimony was that Mr. Graville went to the Automation Section in calibration. Are you familiar with that at all? A. That would mean nothing to me.

Q. It means nothing to you? A. No. Your definition, sir, is much too broad. The word calibration in the Automation Center could be anything from setting up a machine and plugging in some wires to ringing out a complete simulating system.

Q. Mr. Krone, what I am trying to get at is that the man below Mr. Green had obtained the job, had obtained a job at McDonnell and he had failed the examination. A. What type of a job was it? Was it a better job, an equivalent job or a lesser job? I don't know.

Q. Did Mr. Green ask for any better job to you? A. As I recall, he was not going to take a reduction in pay or status or anything else. He was going to keep the job that he had or get a better job.

Q. He wanted the job of lab technician B or a better [654] job? A. Um hum.

Q. That is what he told you? A. Um hum. That did not materially affect our searching for other jobs for him, however.

Q. You did look for other jobs in the plant, did you not? That is your testimony. A. That work of equivalent value, that is right.

Q. As I read this, Communication Engineering Research was contacted. No work for lab technicians in G.E.D. labs. Space and Missile, no openings. F. L. Behlmann for possible future lab technician requirements, no openings, no jobs anticipated. Department 073, no need for lab technicians. Department 853, preparing to surplus twenty-five or thirty lab technicians. Department 141E, no openings. Supply Support, one opening for an hourly sparesplanner. There is some description of the job or class description. Jack Bushman, for Department 845, opening for three quality control planners. Then Mr. Masmussen, Department 867, X-ray technicians and W. T. Burns for Product Support planners, no needs. Apparently there were many

other jobs in other departments that had been—had sent in their information to Mr. Garland, is that correct? A. Apparently.

Q. Much different than the work Mr. Green was doing in [655] Department 958? A. Probably of the same equivalent value.

Q. Mr. Krone, if we add one more fact into this hypothetical question I gave you, that Mr. Graville was still a technician in the work that he was doing over in this other department, which was Automation, would that—— A. (Interrupting) It is another company, by the way, not another department.

Q. Is that Conductron now, is that what it is? A. No, it is the Automation Company.

Q. The Automation Company, were they under the control of McDonnell-Douglas or McDonnell Aircraft at that time? A. They were a subsidiary of McDonnell Aircraft.

Q. Did you hire people for that section? A. Did we? Yes.

Q. Then you did hire people for that section so therefore you had some control over it? A. Yes.

Q. All right. Now if I gave you that additional fact, that he was a technician in this other department, what would be your answer as to whether there was discrimination? A. Mr. Gilden, the word technician and the word calibration cover a tremendously wide scope of activities. A laboratory technician can be a man who does nothing but do the [656] menial task of wiring a simulator that Mr. Green was engaged in, or he can be a man who will be working closely if not a graduate engineer himself doing technical work in a test laboratory. Now a technician in the Automation Company, I can't even imagine where a technician would be used as the ordinary terminology of laboratory technician is concerned.

Q. Wouldn't you consider it unusual, sir, I mean on the data that I have given you, that a man below Mr. Green, who failed the test that was given the job at McDonnell Aircraft, a very simple sort of thing, isn't that unusual? A. Not necessarily. The work that goes on in the Automation Company is primarily clerical paper work. It is a commercial paper electronic data processing function. It is not hardware. It isn't putting parts and things together. It is printing out papers. It is a commercial paper house.

Q. Did you offer Mr. Green that job? A. I don't recall that I did, no.

Q. Do you know whether anybody offered him that job? A. I don't know whether anyone else offered it to him.

Q. You don't have any records where he rejected any job offer, do you? A. I don't have any records of that, no, sir.

Q. Did you discuss with Mr. Sinecki the question of what Mr. Sinecki told Mr. Green in 1962 when he first asked to be [657] reassigned, rather to be given a new assignment in Department 958? A. I don't recall whether it was Sinecki who reported to me that he or someone spoke to Mr. Green about his coming into that department prior to his coming into that department and advising Mr. Green that they needed additional hands to complete the assembly of the one Gemini simulator in schedule. They were taking these people from the Production Department. They would be reclassified as laboratory technicians. And after the job was finished there was no assurance that there would be continued employment in that particular division of the company or in that classification.

Q. Had you discussed this matter with Mr. Green when he came to see you, or did he make any complaints at that time to you? A. Only on the second day when I reported to Mr. Green this discussion that I had with Sinecki.

Q. What did Mr. Green say to you? A. He said he had considered that harassment, and that he thought it was the company's way of keeping him out of that department. Instead of taking it as advice, look you are stepping into a place where you might fall out when the job is over, he considered it an attempt to dissuade him by racial prejudice, because of racial prejudice, from getting into that [658] department.

Q. Did you try to withhold this totem pole from Mr. Robertson when he asked to see it? A. It is my opinion that Mr. Robertson got that from someone else and showed it to me. I don't believe I had it first, I think he had it at the beginning.

Q. You don't recall showing it to him? A. I have an idea he got that from Sinecki.

Q. You don't think you gave it to him and only after he pressured you a great deal to get it? A. I don't recall. As you can see, it is a pretty rough piece of paper. That is not the format literally of a finished totem pole.

Q. Were you familiar with the composition of white and black in Department 958 in the years 1964 and 1965? A. No, sir.

Q. What? A. No, sir.

Q. You had a lot of workups that were sent in to you by various police authorities, from your testimony, and activities of Mr. Green in the picketing and the stall-in, correct? A. You said I had a lot of what?

Q. You received information from police authorities about—— [659] A. (Interrupting) We received information from police authorities about an intended stall-in at the McDonnell premises.

Q. Right. A. Yes.

Q. Who told you about the picketing of Mr. McDonnell's home? A. Who told me?

Q. Yes. A. Mr. McDonnell.

Q. He did? A. Yes.

Q. Now in any of these reports that you received, Mr. Krone, did you ever receive any information that Mr. Green had injured any people? A. I have not received any information that he had injured any people, thanks to the foresight and——

Mr. Gilden: (Interrupting) I am going to object to that. Just answer my question.

Q. (By Mr. Gilden) Did you receive any information that he destroyed any property in any of these matters? A. Again, I answer the same way.

Q. Did you? A. I have not received any such information, thanks to the protection of the police department.

[660] Q. Have you discussed with the police department the fact that they had kept property from being damaged? A. It was evidential.

Q. What was evidential? A. That the removal of the stalled automobiles from the highway prevented any property damage or personal damage.

Q. What property would be damaged by an automobile being in the middle of the street? A. Another car trying to get through to work, for example; an altercation between the employees of this company who were purposely being kept away from work and losing wages.

Q. Who would they fight? A. They would be losing wages.

Q. Who would they be fighting with? A. Those who would be keeping them from getting wages.

Q. You mean they would attack Mr. Green? A. I am quite sure had there not been police protection there would have been such situations.

Q. They would attack Mr. Green and those people around him? A. I am sure they would have been very much in danger, yes, sir.

Q. Now you testified, did you not, that out of this stall-in that there was something like ten minutes delay, is [661] that correct? A. I would say on an average that would be true, on an average.

Q. About ten minutes' delay and about a hundred people affected? A. Several hundred people.

Q. Do you remember the date of the stall-in, Mr. Krone? A. October 1964.

Q. Do you know the exact date? A. I am sorry, I don't recall it.

Q. In October of 1964, was McDonnell-Douglas still the McDonnell Aircraft Corporation? A. Yes, sir.

Q. Were they discriminating against blacks? A. No, sir.

Q. They were not? How long did you—Strike that. Did you know Richard Amberg when he was alive? A. Yes, sir.

Q. When did you first become acquainted with him? A. Well, I can't give you the date. I can give you the approximate time. It was at the time he solicited Mr. McDonnell for funds for the development of the Herbert Hoover Boys' Club.

Q. In what year was that, do you know? A. I said I can't give you the date.

[662] Q. Was Percy Green employed by McDonnell at that time? A. I don't recall.

Q. Well, could you pinpoint as to whether it was after Mr. Green was employed? A. If the Court could help, perhaps they could give us the information as to when the Herbert Hoover Boys' Club was started.

Q. Did you have a close relationship with Mr. Amberg? A. I had met him through Mr. McDonnell and I served, and

I still serve on the Board of Directors of the Herbert Hoover Boys' Club.

Q. Did Mr. Amberg or Mr. Duncan Bauman ever discuss Percy Green with you? A. I don't recall that that has ever been discussed. Mr. Bauman now is also on the Board of Directors of the Boys' Club.

Q. I'm asking whether they ever discussed Percy Green with you? A. I don't recall it, no, sir.

Q. When was your first conversation with Mr. J. S. McDonnell concerning Percy Green? A. Probably as it related to the picketing at his home or at the entrance to the road that leads to his home.

Q. Do you recall that as the first occasion? [663] A. I believe so.

Q. Do you have a newspaper clipping service at McDonnell or did you at that time at McDonnell Aircraft Corporation? A. Did I?

Mr. Foote: Had what? I didn't hear that.

Q. (By Mr. Gilden) A newspaper clipping service at McDonnell Aircraft Company in 1964 and '65? A. An outside service?

Q. No, your own? A. We had a public relations department that I am sure kept——

Q. (Interrupting) Do they clip items out of the newspaper on occasion? A. I imagine they do, yes.

Q. Did you have occasion to examine Mr. Green's file before he came in to see you on the first occasion? A. Yes.

Q. In looking through that file did you notice any newspaper clippings? A. No, sir.

Q. Did you at any time subsequent to that conversation notice any newspaper clippings in his file? A. No, sir.

[664] Q. When was the first occasion that you learned about his climbing the Arch? A. When he told me about

it on the first Thursday and brought out of his wallet a picture, a newspaper clipping and a picture.

Q. Did you ever know him to be a civil rights activist prior to the time he first came in? A. I didn't even know Percy Green prior to that time.

Q. I didn't say know him, had you known of him? A. No, sir.

Q. The question was asked of Mr. Windsor about this committee that was, I think it consisted of a number of black employees of McDonnell Aircraft Corporation. Were you familiar with that committee? A. I have been familiar with several committees. I don't know which one. I know in listening to your conversation this morning I couldn't in my mind identify what you were referring to.

Q. Were there any claims of racial prejudice in the years 1964 and 1965? A. There have been claims of racial prejudice in our company since probably 1950.

Q. All right. A. Claims of racial prejudice doesn't make it so [665] necessarily.

Q. Isn't it a fact, Mr. Krone, that the decision was made to declare the surplus list the day after July 14th when Mr. Green climbed the Arch and that you gave directions to Mr. Sinecki to declare this surplus list? A. Absolutely not.

Q. Were you aware of any editorials printed by the Globe-Democrat in the year 1964 unfavorable to Mr. Green, and had you read these editorials? A. After his layoff or before?

Q. Before his layoff. A. I am not aware of them, no.

Q. After his layoff did you read the editorials? A. Yes, sir.

Q. Do you recall the contents of these editorials? A. One, one I do recall had to do with something that it would be the editorial policy of the newspaper, the Globe-

Democrat, to not give Mr. Green any copy in the newspaper unless it were good journalism, a story that requires —that good journalism requires printing.

Q. I don't understand your answer. Will you say that again? A. I say the editorial that I recall was in the Globe-Democrat and it had to do with the fact that the Globe-Democrat [666] would not give Percy Green any more copy in its newspaper unless it were a story that good journalism demanded.

Q. Copy? You mean articles about ACTION, is that what you mean they wouldn't print any more articles about ACTION? A. As I understand, that was the content of the editorial.

Q. Were you a friend of Mr. Amberg's during this time? A. You honor me. I was not a friend of Mr. Amberg's except for the fact that I did serve on his board at the Herbert Hoover Boy's Club by reason of the fact that McDonnell-Douglas or McDonnell Aircraft Corporation gave two hundred thousand dollars toward a swimming pool. With that gift came Mr. McDonnell's request that an officer of his company also serve on that board. That is how I met Mr. Amberg.

Q. You sat on the board, then, by reason of that request of Mr. McDonnell, is that correct? A. Plus the fact that Mr. Amberg thought I could do some good, I suppose. I would like to think that.

Q. Was Mr. McDonnell on the board at that time in addition to yourself? A. On the Boys' Club board?

Q. Yes. A. No, sir.

Q. Is he on the board at the present time? A. No, sir.

[667] Q. Mr. Krone, do you have racial prejudice? A. No, sir.

Q. None at all? A. None at all.

Q. When was the last time you had a black man for dinner?

Mr. Foote: Your Honor——

A. I could say for lunch.

Mr. Foote: Just a minute, Mr. Krone. I think the cross-examination of Mr. Krone and Mr. Windsor has been very wide in latitude and I have, I think, tried not to object any more than I thought absolutely necessary. I think it is too far now and I think it is too wide. The witness has testified clearly and simply about his state of mind and his actions. He has testified a great deal about his background.

The Court: The objection is sustained. Let's get on with this, Mr. Gilden.

Q. (By Mr. Gilden) Sir, if anyone had engaged in civil rights protest demonstrations, would that be a disqualification for employment at McDonnell-Douglas Corporation or McDonnell Aircraft. When I say McDonnell-Douglas I am talking about McDonnell Aircraft in 1965. A. If that were the only thing that would be against the individual, the answer would be no.

[668] Q. If he engaged in picketing at Mr. McDonnell's home, would that be grounds for disqualification for employment? A. Not in itself alone.

Q. Would that be a matter to be considered for disqualification? A. That would be considered.

Q. Mr. Krone, just so I am clear on the date that Percy Green applied for the job of mechanic radio and electric, there was a job available on that particular date that he applied, was there not? A. Yes, sir.

Q What? A. Yes, sir.

Q. All right. Who is in charge of writing letters to other people when they request information on employ-

ment of a person who has been employed by McDonnell Aircraft? Let's assume someone wants to get a reference. A. You mean a reference check?

Q. Yes, a reference check. A. That would come out of our personnel records section. That would be, the person in charge of that would be a man by the name of Ker, K-e-r, but there would be any number of people on his staff.

Q. Have you reviewed Mr. Green's employment file prior to [669] coming into court here this afternoon? A. I have not.

Q. Did you ever review it to find out the quality of work he performed while he worked at McDonnell Aircraft? A. The last time I reviewed Mr. Green's file was in 1964, Mr. Gilden.

Mr. Gilden: All right.

Will you mark that as Plaintiff's Exhibit 20-A.

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit 20-A).

Q. (By Mr. Gilden) Mr. Krone, I will hand you here—I am sorry, this has already been marked, it is Exhibit No. 6, I am sorry.

Would you take that off.

(Thereupon, the 20-A was marked off by the reporter.)

Q. (By Mr. Gilden) I will hand you what has been marked as Plaintiff's Exhibit No. 6, which I can tell you has been brought into court by the McDonnell Corporation as Mr. Green's personnel—one of many papers in his personnel file, Mr. Krone. Will you look that over, please? A. Yes.

Q. I will hand you what has been marked as Plaintiff's Exhibit 2, which shows the rating of Mr. Green's work on [670] August 21, 1964, do you see that? A. Yes, sir.

Q. That also came out of his file. What does it show as the quality of Mr. Green's work? A. Average.

Q. All right. Now that exhibit 6 that you have, what is that, Mr. Krone? A. Confidential reference information.

Q. Who was it sent to? A. It would be sent to anyone who would inquire as to whether or not—in this particular case it was sent to the Urban League, apparently, in St. Louis.

Q. What is the date that you sent the reference to the Urban League of St. Louis? A. 1965; April.

Q. All right. Would you tell the Court what you marked as to the quality of Mr. Green's work? A. That I marked? I didn't mark a thing.

Q. Well, I mean your—— A. What our company marked?

Q. Yes, your company marked. A. Quality of work, fair.

Q. What are the categories that were checked? A. Superior, satisfactory, fair, poor.

[671] Q. Based upon a checkmark of average work, what would you consider a fair representation of the work to be, the quality of the work to be sent on a reference? A. Well, you would take one, that has three categories, average, above average, below average. I would say average would be fair.

Q. You say average would go along with fair? A. You're using four categories in one form and three categories in the other.

Q. You don't think that the quality work as registered on the form where it said average on your employee release form, which indicated average, would be comparable to satisfactory on the confidential reference information? A. I think it is a matter of semantics.

Q. Well, Mr. Krone, really where you have four categories, superior, satisfactory, fair and poor, fair is below the line, is it not? A. No, sir.

Q. It isn't? A. No, sir.

Q. It is a good—— A. (Interrupting) It is a good rating.

Q. A good rating? A. Yes. It is better than below average.

[672] Q. It is better than poor? A. Yes. And below average.

Q. There is no below average on here. A. There is below average on the other one.

Q. Well, you don't have a below average designation on here, do you?

Mr. Foote: Which one is that, Mr. Gilden?

Q. (By Mr. Gilden) There are no checkmarks for below average? A. That is right. That is what I say. Average is better than below average, and fair is superior to below average; you could be below average and still be on the job. There is no poor mark there, you see.

Q. Did you know Mr. Green's length of service with the company in 1964? A. At the time I reviewed his file, yes, sir.

Q. Do you know how long he was with the company? A. I think his service dates, including his military service, was approximately eight years. I think he had about two years in military service, as I recall.

Q. Now you also testified that you reported to Mr. McDonnell on the stall-in, did you not? A. Yes, sir.

Q. Did you call him or did he call you? [673] A. I called him.

Q. Was there any particular reason why you called Mr. McDonnell on that matter? A. You are very surely right.

He happened to be Chairman of the Board and this was a planned—I called him before it occurred and I called him after it occurred. This was a planned effort to interfere with the normal operation of our business, which, if successful, could have been catastrophic and I thought the Chairman of the Board of the corporation should know about it.

Q. Who was planning this thing, from the information you had, Mr. Krone? A. Mr. Green.

Q. Do you know what organization Mr. Green was with at the time? A. I think it was reputed that he was a member of CORE.

Q. Well, isn't it a fact that CORE was the one that planned this stall-in? A. I don't know that.

Q. Well, you don't know that Mr. Green was the person either? A. You asked me who was it reported to me—excuse me. Who was it that was reported to me who was planning it and——

Q. (Interrupting) You personally don't know Mr. Green [674] prepared this stall-in, or planned it, do you? A. I do not, no, sir.

Q. And you don't know in fact who did plan it, isn't that correct? A. No, sir.

Q. Not personally? A. Not personally.

Q. Who were the people that reported this matter to you? A. Police intelligence.

Q. Which police intelligence? A. City, St. Louis city, County and State.

Q. Do you know who you talked to about this? A. I didn't talk to them directly, it came through my security department.

Q. Who from your security department reported to you? A. Colonel O'Donnell.

Q. Is that someone who was employed by the McDonnell Aircraft Corporation at that time? A. He was at that time.

Q. All right. So, really the report that was filtering in to you was from someone in the police department in the St. Louis area or County of St. Louis, Colonel whatever—what's his name? A. O'Donnell.

[675] Q. O'Donnell? Then to you, is that correct? A. That is right.

Q. So you received the matter really fourth-hand because they were getting it from someone at CORE to the police department to Col. O'Donnell then to you, is that correct? A. Anyone in the management matrix gets his information at fourth- or fifth-hand.

Q. So you were about fourth or fifth down, then, right? A. That is about right.

Q. OK. Did you ever talk to anybody who knew something about the stall-in, or could give you information?

Mr. Foote: I am sorry, I didn't understand that.

Q. (By Mr. Gilden) Did anyone personally give you any information about the stall-in who knew something about it? A. About the results of it?

Q. Not the results but the planning of it. A. That knew something about it?

Q. Yes. The planning of it. A. I just told you where I got my information.

Q. I just asked you whether anybody personally told you about the planning of the stall-in itself who knew something about it? A. I presume that the only—I don't presume. The only person that informed me about the stall-in was the head [676] of my security department.

Q. That is Col. O'Donnell? A. Yes, sir.

Q. That is the only person you talked to about it? A. That is the only person I talked to about it, that is right.

Q. Mr. Krone, you knew that Percy Green had filed a complaint with the Missouri Commission on Human Rights, is that correct, in 1964, at the time of his layoff? A. Yes.

Q. You also knew that he reported racial prejudice and discrimination to the Navy Department? A. Yes, sir.

Q. He also wrote to some other federal commission about the practices at McDonnell Aircraft Corporation at that time, is that correct? A. Yes, sir.

Q. Did you consider that to be detrimental to Mr. Green, the complaints of racial discrimination? A. No, sir. He told me he was going to do it in our final interview and I said that is your prerogative under the law. You may proceed in that direction. It has nothing to do with our relationship. We will still continue——

Q. (Interrupting) Did you consider that grounds for [677] refusal of hiring? A. No, sir.

Q. That would not be taken into consideration in the event that he asked for application for employment? A. No, sir.

Q. Were you involved at all in this security around Mr. Green on the date he asked for employment in July of 1965? A. There was no such thing as security around Mr. Green in July of 1965.

Q. Your security guards were not called upon to go down to the employment office? A. They were not. There is a guard station right at the employment office. There is a permanent guard station. It has been there all the time.

Q. You were called at that time, were you not, and you have so testified, on the date he applied for a job? A. I was called—Mr. Windsor was called. He happened to be in my office. I said we have joint telephone extensions. We picked up the call on a desk set in my office.

Q. So the decision was made on that particular date not to hire him? A. A decision was made on that particular date not to hire him.

Q. Did you talk to Mr. McDonnell about it on that [678] particular date? A. No, sir.

Q. The decision was made jointly by you and Mr. Windsor? A. It was made ultimately by me.

Q. Ultimately by you? A. Yes.

Mr. Gilden: I have no further questions.

Mr. Foote: Your Honor, I may have one or two questions then I believe our evidence will be closed. I wonder if I could ask for about a five-minute recess to collect the exhibits and so forth?

The Court: We will have a short recess.

(Temporary recess.)

(After a brief recess, court was duly reconvened and the following proceedings were had:)

Mr. Gilden: Judge, may I ask Mr. Krone a few more questions?

The Court: Very well.

Q. (By Mr. Gilden) Mr. Krone, I have taken the court file—Do you recall seeing the decision of the Equal Employment Opportunity Commission with respect to the complaint of Percy Green? A. No, sir, we never did.

Q. You have never seen the decision at all? [679] A. No, sir.

Q. I will let you look at it. A. Oh, I am sorry, I have seen that. This is the one that shows reasonable doubt, you mean?

Q. Reasonable cause not reasonable doubt. A. I thought you were referring to the 1964 decision.

Q. I am talking about the decision of the Equal Employment Opportunities Commission. A. I see this.

Q. You have read it? A. Yes.

Q. Do you recall talking to a representative of the Equal Employment Opportunities Commission? A. I recall talking to an official from the Department of Labor, who was substituting for E.E.O.C. as he was on his way east from Kansas City.

Q. Are you known as the Director of Personnel? A. No, sir.

Q. I will read something in this decision and ask you whether this is true or false. (Reading) The Director of Personnel stated that a person such as Green would not be hired now or ever by McDonnell as he would have a disruptive influence on other employees and undermine the present harmonious atmosphere within the plant. Is that a correct [680] statement? A. I don't know who the director of personnel would be.

Q. Is that a correct statement on a rehiring of Percy Green? A. By whom?

Q. I asked you whether that would be true for refusal to hire Percy Green on your part? A. What is the date of that statement? The date that statement was given?

Q. Just forget whether it was stated to a person—— A. Was that before or after the stall-in?

Q. This was after the stall-in, sir. A. Then I would say it would be a true statement.

Q. All right. Is it also true, Mr. Krone, that under no circumstances would you hire Percy Green at this time unless you are ordered to do so by the Supreme Court of the United States? A. That is true.

Q. You feel that Percy Green would have an adverse effect, his presence or employment would have an adverse effect on the white employees of McDonnell-Douglas Corporation? A. Are you asking for an opinion?

Q. Yes. A. I have no opinion one way or the other.

[681] Q. You don't think he would be a disruptive influence or have an adverse effect on the white employees at McDonnell-Douglas at the present time? A. I have no opinion.

Q. Does that mean you don't know? A. It means I have no opinion. Anything I would say would be hypothetical.

Q. You have no opinion whatsoever in this regard? A. I have no opinion.

Q. Isn't it true, Mr. Krone, that the basis upon which you refuse to hire Percy Green is because he climbed the Arch? A. It is not true. The reason why we would not hire Percy Green was because of the concerted effort to do harm and damage to the orderly operation of our plant.

Q. And the—— A. (Continuing) That is the reason.

Q. And the actual fact is, Mr. Krone, is it not, that the most damage that was ever done under any of the protest demonstrations of Mr. Green from the time that he worked at McDonnell-Douglas through the time that he next made application was that a few hundred people were delayed for ten minutes, is that correct? A. Only because of the alert action of the police.

[682] Q. Just answer my question, sir, isn't that correct? A. That is correct, fortunately.

Q. And you don't know as a fact that Percy Green organized the stall-in? A. I do not know personally that he did, no.

Q. Nor did you see Percy Green on the date that the stall-in occurred, is that correct? A. That is correct. I did not personally see him.

Q. And you personally don't know what his participation was in the stall-in other than the fact that he had an automobile that was stalled in the line of traffic? A. And he was arrested.

Q. He was arrested, and that was about a mile away from the McDonnell plant? A. The information I have is that it was closer than that.

Q. How close was it then? A. Within a quarter of a mile.

Q. Within a quarter of a mile of a McDonnell plant? A. Yes, sir.

Mr. Gilden: I have no further questions.

Mr. Foote: No questions, Your Honor.

(Witness excused.)

Mr. Foote: I would like to have one more exhibit [683] marked.

Mr. Gilden: I will admit that is part of your records, it can go in.

Mr. Foote: Can this be marked Defendant's Exhibit G.

(Thereupon, the document above referred to was marked by the reporter for identification as Defendant's Exhibit G.)

Mr. Foote: Your Honor, Mr. Gilden and I have stipulated that what has been marked Defendant's Exhibit G does not have to be identified as from the personnel records of the McDonnell Corporation. It is or purports to be on its face the application for employment made out by Daniel Lee Graville, G-r-a-v-i-l-l-e, who is the same man who has been testified about on the totem pole. I would offer this into evidence without further testimony about it.

Mr. Gilden: No objection, Your Honor.

The Court: It may be received.

Mr. Foote: Defendant has no further evidence, Your Honor.

The Court: Any rebuttal?

Mr. Gilden: I have some rebuttal, Your Honor, not very much.

PLAINTIFF'S REBUTTAL EVIDENCE

PERCY GREEN, II,

recalled, having been heretofore duly sworn, testified further as follows:

[684] **Direct Examination;** by Mr. Gilden

Q. Your name is Percy Green? A. Yes.

Q. Mr. Green, at the time that you worked at McDonnell Aircraft Corporation in 1963 and 1964, were there other members of CORE working at the company as well as yourself? A. Yes, it was.

Q. Do you know how many other members of CORE were employed at McDonnell Aircraft during this period? A. I know of two persons at this time, I believe that was still working there. The others I don't know their full name.

Q. Do you know their names? A. One, Joe Fischetti, I remember him simply because he is the person that introduced me to CORE in 1961. There was a fellow, I recall, named Bugs Harris. The other person, I don't know him by the full name, but, you know, by nickname.

Q. All right. A. Joe Fischetti, by the way, was a white person. Bugs Harris, I recall, was black.

Q. I see. So you know at least two members of CORE by name? A. Yes.

Q. And there may have been others that you don't know about? [685] A. Yes.

Q. And there may have been others that you don't know about? A. Certainly. Certainly. By it being such a long time ago, those persons in CORE, such a turn-over.

Q. Well, you heard Mr. Krone testify, did you not? A. Yes, sir.

Q. And you heard Mr. Windsor testify? A. Yes.

Q. Now, in August of 1964 when you went in to see Mr. Krone, were you offered a job? A. No.

Q. Would you have taken another job if it was offered to you? A. Yes. And I so said to Mr. Krone as well as Windsor.

Q. Did you limit the type of employment to lab technician at the time you talked to them? A. No. In fact, I told them——

Q. (Interrupting) When you say them, who directly did you talk to? A. Mr. Krone and Windsor. I told them was there any reason why I could not go back to the type of work that I was doing before I made my transfer. And I never did get a decent—I never did get an answer. I never did get a decent answer.

[686] Q. But you would have accepted other employment? A. Yes.

Q. And you were actually unemployed for what period of time after you left McDonnell, then, in 1964? A. Oh, for better than a year.

Q. Better than a year? A. Yes.

Q. So you could have accepted and would have accepted employment at any time during that year? A. Absolutely.

Q. Did anybody call you from McDonnell Aircraft Corporation during the year that you were out, offering you a job? A. No. No one called. No one.

Q. And you would have accepted a job other than lab technician B? A. Yes.

Q. And you would have considered other types of employment at the company? A. That is right.

Mr. Gilden: You can inquire.

Mr. Foote: No questions.

Mr. Gilden: That is plaintiff's case, Your Honor.

The Court: Gentlemen, I think there is some of [687] Plaintiff's Exhibit 33 which was not offered in evidence, is that correct?

Mr. Gilden: That is correct, Your Honor.

The Court: Well, how much time do you want in which to submit to the Court suggested findings of fact and conclusions of law, Mr. Gilden?

Mr. Gilden: I would like two weeks for that purpose, Your Honor.

The Court: Do you want a transcript?

Mr. Gilden: I can't afford a transcript, Your Honor. I would like one but I can't—I would like the Court to supply one for free.

The Court: All right. You want two weeks in which to file suggested findings?

Mr. Gilden: That is correct, Your Honor.

Mr. Foote: Your Honor, the defendant would like a transcript and is perfectly willing to pay for it. I wonder if the time for filing briefs could run from the date of the filing of the transcript?

Mr. Gilden: You said a brief, he asked for suggested findings.

The Court: I want a brief along with it too.

Mr. Gilden: Your Honor, I will submit my case without a brief, I will merely submit questions of fact and conclusions of law.

[688] The Court: Well, I want a brief, Mr. Gilden. You have apparently done some research in the law and I would like to have the benefit of it.

Mr. Gilden: Well I will need more than two weeks to prepare a brief for this Court.

The Court: Very well. That is exactly what I want. How much time do you want?

Mr. Gilden: Give me thirty days, Your Honor.

The Court: All right.

Mr. Foote: What about the transcript? May we have time from the filing of the transcript?

Mr. Gilden: Are you just getting a copy for yourself?

Mr. Foote: Yes. But I would, since the transcript is going to be typed and filed, it seems to me it would be more beneficial to the Court to have the suggested findings of fact refer by page to the evidence and so forth, as I have suggested to the Court.

The Court: Well, if you do buy a transcript it will be available to Mr. Gilden. It would be a matter of court record, and he could use it.

Mr. Foote: Surely.

The Court: So I will let the thirty days in which Mr. Gilden has to file his suggested findings of fact, conclusions of law and a brief run from the date of the filing of the transcript.

[689] Mr. Gilden: All right.

The Court: How much time after that do you want?

Mr. Foote: All right.

The Court: How much time after that do you want?

Mr. Foote: The same amount, Your Honor.

The Court: All right. Thirty days. How much time after that do you want to respond?

Mr. Gilden: Fifteen days.

The Court: All right. Thirty, thirty and fifteen, after the transcript is filed.

Mr. Gilden: You want suggested findings of fact, conclusions of law at the time our brief is submitted to you?

The Court: At the same time you have your brief, that is correct. I want that from both parties.

Mr. Foote: All right, sir.

The Court: And your response will be just a brief, discussing whatever you may desire that is brought up by opposing counsel.

DEFENDANT'S EXHIBIT A

PLAN III

Instruction Sheet

General Instructions:

Be sure to have a watch or clock which works.

Assemble at Natural Bridge and Fair at 5:00 a.m. It is of the utmost importance that everyone be exactly on time.

There will be five teams, each team consisting of four cars. Teams 1, 2, and 3 will move into position first. Teams 4 and 5 will move into position 15 minutes later.

Team 1 will tie up Bridgeton station Rd. North of Natural Bridge.

Team 2 will tie up Lindbergh Blvd. and Brown Rd. Intersection.

Team 3 will tie up Frost Avenue and Graham Road Intersection.

Team 4 will tie up Airport Road 100 yards East of Graham Rd.

Team 5 will tie up Brown Road 50 yards North of

Attention Drivers:

1. Stop car at keypoint. The cars should be lined up next to each other—see pictorial view of Plan III position.
2. Cut wheels toward centerline.
3. Turn engine off. Leave parking lights on.
4. Put on emergency brake.
5. Raise all windows and lock doors.
6. Remain in car when policeman arrives. **Do Not** leave car.
7. Cars are to remain in position for one hour.

Attention Team Leaders

1. Check all cars to see that Drivers have carried out above instructions.

2. The Team Leader will announce Plan III and give police a press release.

3. Team Leader will stall police as long as possible—shooting for the one hour goal.

4. If police say, "You're under arrest" without asking us first to move on—tell him he must give us a choice.

5. If told to "drive on or be arrested"—drive on if one hour has elapsed. If one hour has not elapsed—stay pat and be arrested.

6. If police threaten to call a tow truck, leader will inform them that we will surrender to the police and drive to police station.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

PERCY GREEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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NOTICE OF RELEASE — DATE 22 August 1964

NAME Grogan, Percy H., Jr. — BLOCK NO. 065078 — DEPT. NO. 958

JOB CLASSIFICATION Lab. Tech. B (C22) — GRADE 07 — EFFECTIVE ON 28 Aug 64 — AT 1600

REASON FOR RELEASE Reduction in Force Due to Reorganization of Divisio:.

IS THIS EMPLOYEE ELIGIBLE FOR RE-EMPLOYMENT? Yes

IS THIS EMPLOYEE ELIGIBLE FOR TRANSFER? Yes

APPROVALS:

PERFORMANCE RECORD:

	ABOVE AVERAGE	AVERAGE	BELOW AVERAGE
QUANTITY OF WORK		✓	
QUALITY OF WORK		✓	
DEPENDABILITY		✓	
COOPERATION		✓	
ABILITY TO LEARN		✓	

R L Goldford — SUPERVISOR OR FOREMAN — 8/27/64 — DATE

E. V. Sinecki — GENERAL FOREMAN — 8-27-64 — DATE

DEPT. HEAD (FOR SALARIED EMPLOYEES ONLY) — DATE

MAIL FINAL CHECK(S) TO: STREET

CITY ZONE STATE

PLTP'S EX. No. 2
Pl. Ruth Wood Rep: 1-12-70

Bldgs 4 & 17

APPROVED ORIGINAL – PERSONNEL RECORDS SECTION

MCDONNELL
EMPLOYEE RELEASE

294 called payroll 8-31-64 ltr.

DATE 21 August 1964

NAME Green, Percy H., Jr. CLOCK NO. 065078 DEPT. NO. 958

JOB CLASSIFICATION Lab. Tech. B (C22) GRADE 07 EFFECTIVE ON 28 Aug 64 AT 1600

REASON FOR RELEASE Reduction in Force Due to Reorganization of Division

40 Hours Pay

IS THIS EMPLOYEE ELIGIBLE FOR RE-EMPLOYMENT? Yes

IS THIS EMPLOYEE ELIGIBLE FOR TRANSFER? Yes

PERFORMANCE RECORD:

	ABOVE AVERAGE	AVERAGE	BELOW AVERAGE
QUANTITY OF WORK		✓	
QUALITY OF WORK		✓	
DEPENDABILITY		✓	
COOPERATION		✓	
ABILITY TO LEARN		✓	

APPROVALS:

R T Bedford — SUPERVISOR OR FOREMAN — 8/27/64 DATE

E V Sinecki — GENERAL FOREMAN — 8-27-64 DATE

DEPT. HEAD (FOR SALARIED EMPLOYEES ONLY) — DATE

MAIL FINAL CHECK(S) TO: STREET

CITY ZONE STATE

72-490

SEP 23 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

McDonnell Douglas Corporation, petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on June 28, 1972.

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit are reprinted in Appendix A hereto. The Order of the Court of Appeals on Petition for Rehearing, together with supplemental majority and dissenting opinions, are reprinted in Appendix B. The Order of the Court of Appeals on Re-

newed Petition for Rehearing en banc is reprinted in Appendix C. The Court of Appeals opinions have not been officially reported as of the date of the filing of this petition. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, reported at 318 F.Supp. 846, is reprinted in Appendix D.

JURISDICTION

The original opinion of the three-judge panel of the Court of Appeals was filed on March 30, 1972. In response to petitioner's timely Petition for Rehearing En Banc, the original opinion was modified by the panel on May 12, 1972 and rehearing was denied without prejudice to the right of either party to file a Petition for Rehearing addressed to the modified opinion. Petitioner then timely sought rehearing en banc on the modified opinion, which was denied by an evenly divided court on June 28, 1972. This petition was filed within 90 days of June 28, as required by Rule 22(1). **Department of Banking v. Pink**, 317 U.S. 264 (1942); **United States v. Healy**, 376 U.S. 75 (1964).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under Title VII of the 1964 Civil Rights Act, is an employer's right to refuse to hire a job applicant who has committed illegal and unprotected acts against the employer nullified or circumscribed merely because the applicant is black?

2. In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?

STATUTES INVOLVED

This case involves the construction and interpretation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and particularly § 2000e-5(g), which provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment . . . for any reason other than discrimination on account of race, color religion, sex or national origin or in violation of § 704(a) [§ 2000e-3(a)]."

STATEMENT OF THE CASE

This suit was instituted in the district court by respondent Green under Title VII of the 1964 Civil Rights Act ("the Act"), 42 U.S.C. § 2000e *et seq.*, which was designed to provide equal opportunity in employment. Respondent, a black man, contended that petitioner McDonnell violated the Act when it refused to hire him when he applied for a job as a mechanic in July of 1965.

Green, at all relevant times, was Chairman of ACTION, a militant Civil Rights group. In October 1964, he and members of ACTION and other Civil Rights groups conducted a massive "stall in" demonstration against McDonnell, in which the participants, including respondent, intentionally stalled their cars on five main access roads to petitioner's plant at the time of the morning rush hour in an attempt to snarl traffic and to impede petitioner's operations. Respondent stopped his car on purpose, intending to block traffic, and when he refused to move it voluntarily, it was towed by the police. Respondent was arrested for obstructing traffic, a misdemeanor under Missouri law, pleaded guilty, and was fined $50.00.

On July 2, 1965, a group of protesters headed by respondent participated in a "lock-in" incident which culminated in the chaining and padlocking of a door of a building which housed employees of petitioner, locking them inside the building.

Three weeks later, Green applied for work at the McDonnell plant as a mechanic. His application was rejected, and respondent filed a complaint alleging discrimination against him "because of his involvement in civil rights activities."

After a four-day trial, the district court found that Green was refused employment because of his participation in the "stall-in" and "lock-in" which were not "protected activities" within the contemplation of § 2000e-3(a), and held that the Act was not violated by petitioner's refusal to hire respondent based upon his unlawful acts directed against it.

On March 30, 1972, a three-judge panel of the Eighth Circuit, one judge dissenting, reversed the district court and remanded for a new trial, holding (1) that respondent had presented a *prima facie* case of racial discrimination by showing that he was black and qualified for the job and (2) that petitioner had failed to sustain its burden of showing that respondent's unlawful conduct would adversely affect his ability to perform the job.

Petitioner filed a timely Petition for Rehearing en banc, which resulted in a primarily linguistic modification by the panel of Point V of the majority opinion and which also produced a supplemental dissent by Judge Johnsen. In view of the modification, McDonnell's Petition for Rehearing was overruled without prejudice to the filing of another request for rehearing on the modified opinion. McDonnell's renewed Petition for Rehearing en banc was denied by a four-to-four vote of the Court En Banc on June 28, 1972.

REASONS WHY THE WRIT SHOULD BE GRANTED

The majority opinion has formulated some unique principles and has erected some novel standards which, if allowed to stand unreviewed, could have a significant influence on employment and race relations and could revolutionize the trial of Civil Rights cases. The majority opinion, though hardly a model of clarity, raises important questions which should be resolved by this Court.

I

The principal question presented by this case is whether § 706(g) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(g)) means what it says. That section provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment . . . for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of § 704(a) [§ 2000e-3(a)]."

The undisturbed finding of the district court was that respondent was refused employment because of his participation in the "stall-in," an activity unlawful under Missouri law, for which he was fined $50.00 on his plea of guilty.[1] Since respondent was not exercising any of his First Amendment or Title VII rights by participating

---

[1] The concurring opinion of Judge Lay on appeal takes issue with the district court's findings as to respondent's role in the "lock-in." It is unclear to what extent the majority opinion joins in that criticism, but the principles involved in this petition are the same whether the "stall-in" is considered alone or in conjunction with the "lock-in."

in the stall-in, the Court of Appeals, following **Cox v. Louisiana**, 379 U.S. 536 (1965), held that respondent's behavior was not protected by the Act. Respondent was doing nothing but disrupting petitioner's business and interfering with its operations. Can it be said, then, that there is any restriction whatsoever upon an employer's right to refuse employment to an individual, black or white, because of his engagement in such behavior?

It has always been the law of labor relations and of civil rights that an employer has the right to refuse to hire a prospective employee "for good reason, bad reason or no reason, absent discrimination." See, *e.g.*, **Tims v. Board of Education of McNeil, Arkansas**, 452 F. 2d 551 (8th Cir. 1971). The effect of the Court of Appeals' decision in this case is to repudiate this precept as regards minorities and to permit an employer to refuse to hire a person "for good reason, bad reason or no reason, **unless he is black**," in which case the employer will be presumed to have discriminated.

Judge Johnsen's dissent (p. A-23, *infra*) capsulizes the fundamental fallacy of the majority approach:

> ". . . one who has committed such unlawful deeds against some business and then seeks to be hired by it, does not, in my opinion, stand in any different position or have any right to different treatment because he is a black, than if he were a white, in relation to the right of refusal to hire him."

The Court of Appeals has disregarded the Congressional mandate that an employer shall be entitled to refuse to hire an applicant for any reason other than one based on race, color, religion, sex or national origin. Its decision was premised, in part, on a badly distorted reading of this Court's opinion in **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971). In the process, the appellate court

has handed a carte blanche to self-ordained militant guardians of the public welfare, telling them that their unlawful and obnoxious behavior cannot successfully be used by the target employer as a legal reason for denying them employment. The ramifications of such a rule, not limited to the labor field, are as alarming as they are self-evident.[2]

Moreover, although the majority opinion speaks in terms of a "black man," it must be remembered that the Act covers not only race and color but also sex, religion and national origin. Apparently, therefore, the Eighth Circuit majority opinion, if allowed to stand, would effectively preclude an employer from legally rejecting a prospective qualified black employee, or a woman, or a Catholic, or a Canadian, because of his or her admittedly having:

(a) caused a "bomb scare" at the employer's plant, resulting in the evacuation of the plant and loss of production; or

(b) slandered the Chairman of the Board of the company by calling him a "Communist" on television; or

(c) assaulted the personnel manager's wife.

According to the Eighth Circuit, a qualified prospective minority group applicant could make a *prima facie*

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[2] The district court commented as follows:

"To order the rehiring of plaintiff, who has been guilty of such serious act of misconduct, cannot reasonably be said proper action to effectuate the policies of Title VII. To hold that plaintiff is entitled to be rehired is to put a premium on misconduct of this type and to encourage like conduct on the part of others. The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of this exercise, not to license them to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers." 318 F. Supp. at 851.

case of discrimination merely by showing the existence of a job opening, even though the employer may not have known of the applicant's religious or ethnic background when he made the decision not to hire. The majority opinion has also in effect sanctioned reverse discrimination by imposing rigorous standards with respect to applications by a minority group member but permitting the rejection of a male Caucasian American for any reason whatsoever.[3] The supplemental dissenting opinion (p. A-37, *infra*) notes that "the majority thus are holding, not that Green is entitled to the same opportunity as a white, but that he is entitled to one of a different and greater degree."

Additionally, although this case arises in the context of an application for employment, its teachings would appear to be fully relevant to disputes concerning discharges, layoffs, fringe benefits and discipline.

II

The second aspect of this case requiring this Court's attention is the remarkable holding of the Eighth Circuit panel majority that although the search in a Title VII case is for the employer's motivation, subjective evidence offered by the employer as to his reasons for his actions, carries "little weight in rebutting charges of discrimination." The prevailing Eighth Circuit opinion improperly shifts the burden of proof to the defendant almost immediately upon the filing of the lawsuit and then gags that defendant and precludes him from explaining his motivation as to the disputed decision. The inevitable cumulative effect of these novel evidentiary principles was accu-

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[3] In **Griggs v. Duke Power Co.**, 401 U.S. 424, 431 (1971), this Court said: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

rately forecast by Judge Johnsen in his dissent (p. A-27, *infra*):

> "What the court has held can therefore, in my opinion, only mean that McDonnell is being required to rehire Green."

The apparent thesis underlying the majority's abolition of subjective evidence is a suspicion that men may lie when questioned about their motives. This type of reasoning smacks of the old common law rule which rendered a party incompetent to testify because of his interest in the outcome of the litigation. With the exception of the present case, however, modern courts have recognized the ability of the fact-finder to weigh the interest of the party in assessing his veracity. The rule propounded in this case is contrary to the Eighth Circuit's own pronouncement in **Nelson v. Grimes**, 256 F. 2d 816, 819 (8th Cir. 1958), where it said:

> "It is safe to say that whenever motive, intent, belief or knowledge of a party is a material issue or element in a case, he may testify directly with respect thereto."

This Court in **United States v. Yellow Cab Co.**, 338 U.S. 338 (1949), also acknowledged that one of the principal tasks of the fact finder in many types of cases, criminal and civil, is to determine motivation and intent and, in the process, to distinguish between truth and pretense. Petitioner is at a loss to determine how such an inquiry can be undertaken on the basis of "objective" evidence or, for that matter, to understand what "objective" evidence is.

The principles announced in the prevailing Eighth Circuit opinion were not advocated by any party or amicus curiae but were conceived *sua sponte* by the panel majority. Hence, the Court of Appeals was without benefit

of the views of the participants in this dispute as to t legality, desirability and practical effect of such rul and it obviously failed to appreciate their ramificatio in this burgeoning area of the law. Judicial efforts bend over backwards to accommodate Title VII plaintif have culminated in this decision by standing the law its head.

As perhaps indicated by the equal division within t Court of Appeals on petitioner's renewed petition fo rehearing en banc, and as well articulated by Judge Joh sen in his original and supplemental dissents, the majo ity in this case have so radically departed from wel established precedent and have so thoroughly rewritt Title VII and eroded the rights of employers that revie by this Court is appropriate and necessary.

CONCLUSION

For the reasons stated, this Petition for Writ of Ce tiorari should be granted.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20,596

Percy H. Green,
Plaintiff-Appellant,
v.
McDonnell Douglas Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

March 30, 1972

Before JOHNSEN, LAY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Percy Green, a black citizen, brought this action against McDonnell-Douglas Corporation (McDonnell) under Title VII[1] of the Civil Rights Act of 1964, seeking relief from the latter's allegedly discriminatory conduct in denying Green employment in July 1965. Green also pressed a claim that McDonnell had discharged him from a job in August 1964 for reasons of race in violation of 42 U.S.C. § 1981. The district court denied Green any relief. *Green v. McDonnell-Douglas Corporation*, 318 F.Supp. 846 (E.D.

[1] 42 U.S.C. §§ 2000e et seq.

Mo. 1970). Green prosecutes this timely appeal. For the reasons stated below, we reverse and remand this case for further proceedings.

To place this controversy in an appropriate frame of reference, we find it necessary to examine chronologically both the underlying facts and the procedures followed in the district court. Although the immediate controversy springs from the refusal of McDonnell to employ Green on July 26, 1965, its origin lies in an earlier employment relationship. In 1956, McDonnell employed Green as a mechanic. He remained with the company continuously, except for twenty-one months of honorable military service, until he was laid off on August 28, 1964. Initially, Green's job was protected by union security, but in 1963 he transferred to a non-union position as a laboratory technician, performing work on research projects in the Electronic Equipment Division of McDonnell. In 1964, the workload decreased in the Electronic Equipment Division, and the company laid off several persons, including Green.

Green, a long-time activist in the movement to obtain equal rights for black citizens, vigorously protested his discharge as being racially motivated. He also filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights. As a member of CORE, and later as a member of ACTION, another civil rights organization, Green, in late 1964 and during 1965, participated in several demonstrations which were staged to call attention to McDonnell's allegedly discriminatory employment practices. These demonstrations included picketing the home of James F. McDonnell, Chairman of the Board of McDonnell; blocking a main highway access route leading to the McDonnell plant during a traffic

"stall-in", and, participating in a civil rights demonstration during which the doors of a downtown St. Louis building which housed certain McDonnell employees were locked with chains by some of the demonstrators.

On July 25, 1965, McDonnell ran an advertisement in the St. Louis, Missouri, newspapers seeking qualified electrical mechanics. The next day Green applied for one of these positions, but McDonnell, although still seeking qualified mechanics, refused to hire him. McDonnell never has disputed Green's technical ability to perform the work required in that position. Thereafter, on September 14, 1965, Green filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), alleging that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." On May 8, 1967, the EEOC determined that reasonable cause existed to believe that McDonnell had violated 42 U.S.C. § 2000e-3(a) by refusing to employ Green "because of his involvement in civil rights activities."[2] It made no determination on the allegation of racial bias.

The EEOC unsuccessfully attempted to conciliate the dispute. Accordingly, on March 19, 1968, it issued a thirty-day letter notifying Green that he might institute civil action in federal court pursuant to 42 U.S.C. § 2000e-5(e). This litigation followed.

In a complaint filed April 15, 1968, Green alleged that McDonnell had discriminated against him by denying him employment "because of his involvement in civil rights activities." On March 20, 1969, Green filed an amended complaint alleging that McDonnell also had discriminated

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[2] The EEOC abstained from taking action in deference to the Missouri Commission on Human Rights, *see* 42 U.S.C. § 2000e-5(c), until February 4, 1966, when Green requested the EEOC to assert jurisdiction.

against him by denying him employment "because of his race and color." Upon motion of McDonnell, the district court struck this additional claim on the ground that the EEOC had made no finding as to reasonable cause on this claim. *Green* v. *McDonnell-Douglas Corp.*, 299 F.Supp. 1100 (E.D. Mo. 1969).

Although 42 U.S.C. § 1981[3] was not specifically mentioned in any of the pleadings, Green, during trial and in post-trial briefs, construed the pleadings to assert that his 1964 layoff was motivated by racial prejudice in violation of that statute.

The district court rejected Green's claim that McDonnell denied him employment in 1965 because of his participation in protected civil rights activities. The court also rejected the 1964 layoff claim brought under § 1981. It summarized its conclusions as follows:

> (a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.
>
> (b) Plaintiff's layoff claim under 42 U.S.C. § 1981 is barred by the statute of limitations.
>
> (c) The Civil Rights Act does not protect activity which blocks entrance into or from an employer's plant or office.
>
> (d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire. [318 F. Supp. 851]

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[3] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On this appeal, Green raises the following contentions:

(1) The trial court erred in dismissing his claim under 42 U.S.C. § 1981 for relief from his allegedly unlawful layoff.

(2) The trial court erred in determining that his participation in the "lock-in" and "stall-in" demonstrations did not fall within the protection of 42 U.S.C. § 2000e-3(a).

(3) The trial court erred in striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race.

I

We turn first to the issues relating to the 1964 layoff. Several circuits, following the rationale of *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), have concluded that 42 U.S.C. § 1981 affords a remedy in federal court for private discrimination in employment. *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). This court has not yet passed upon this question. We find it unnecessary to do so here since, even if we assume that such an action will lie, the action in this case would be barred by the applicable statute of limitations.

Although § 1981 contains no limitation period, an action for deprivation of civil rights brought under a federal statute such as § 1981 is governed by the most analogous state statute of limitations. *See Glassco* v. *Howell*, 431 F.2d 863, 864 (8th Cir. 1970); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*, 427 F.2d at

488. In this case, the parties agree that Missouri's five-year limitation period for contracts[4] is the most analogous period of limitation. Within that limitation period, Green filed no pleading which mentioned either the 1964 layoff or 42 U.S.C. § 1981.

On August 24, 1970, several months after the trial court had heard the evidence, and more than five years after the 1964 layoff, Green moved under Fed R. Civ. P. 15(b) to amend his complaint to charge discrimination in "violation of 42 U.S.C. § 1981 in that it was based on race, color, and civil rights activities." The trial court denied leave to amend. The record discloses that McDonnell did not expressly or impliedly consent to any action under § 1981, and that any evidence relating to the 1964 layoff was introduced as a background for Green's claim to relief from McDonnell's refusal to hire him in July 1965.

Green contends that his amended complaint, which was filed within the limitation period, should be construed to state a claim under § 1981 for discrimination in the 1964 layoff. We cannot accept his broad reading of the language contained in the amended complaint. Although that complaint alleges discrimination "because of . . . race and color," it specifically refers to unlawful employment practices occurring on "July 26, 1965, and thereafter." This language convinces us that the amended complaint was not intended to encompass the 1964 layoff. Accordingly, we conclude that the district court properly dismissed the layoff claim.

II

We now examine Green's contention that the district court erred in ruling that his participation in the "stall-in"

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[4] Mo. Ann. Stat. § 516.120(1) (1952).

and "lock-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a). We confine our discussion here to the question whether Green's participation in the "stall-in" is a protected activity under §2000e-3(a). The record does not support the trial court's conclusion that Green "actively cooperated" in chaining the doors of the downtown St. Louis building during the "lock-in" demonstration. *See* Judge Lay's concurring opinion, *infra*. We therefore measure the protection afforded by §2000e-3(a) against Green's admitted participation in the "stall-in."

Section 2000e-3(a), as pertinent, reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In support of his protection argument, Green stresses the language forbidding discrimination "because [an applicant] has opposed any practice made an unlawful employment practice by this subchapter." According to Green, since the "stall-in" was a non-violent protest designed to call attention to McDonnell's allegedly discriminatory practices, this activity commands the protection of §2000e-3(a). McDonnell, on the other hand, asserts that the unlawfulness of this protest removes it from the protection of that section.

We find little relevant authority for either position. The legislative history of Title VII provides us with no guidance as to the scope of the protection afforded by §2000e-3(a), and the small body of case law surrounding that

section contains little discussion on the subject.[5] Nevertheless, we think it is clear from the language of the statute that Congress sought to protect employees and job applicants from employer retaliation for filing complaints to the EEOC. Those who have the courage to challenge discriminatory practices of an employer merit that protection. Without doubt, lawful protest also commands the same protection, but we find no suggestion that protection extends to activities which run afoul of the law. Accordingly, we agree with the district court that the "stall-in" demonstration was not a protected activity under §2000e-3(a).

III

We find merit in Green's contention that the district court erred in striking the allegation that McDonnell denied him employment in July 1965 "because of his race and color." Such discriminatory practices are prohibited by 42 U.S.C. §2000e-2(a)(1), which provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

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[5] As support for his position, Green cites passages from *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969). In that case, the Fifth Circuit held that § 2000e-3(a) prohibits an employer from discharging an employee who makes false statements in a complaint to the EEOC. Although the opinion characterized the protection of § 2000e-3(a) as broader than the analogous protection afforded an employee under the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), and under the National Labor Relations Act, 29 U.S.C. § 158(a)(4), the court did not attempt to define the parameters of § 2000e-3(a).

As noted above, the district court struck this allegation on the ground that the EEOC had made no finding of reasonable cause. Although the enforcement provisions of Title VII are silent as to the necessity of such a finding, it is now well settled that a complaining party need satisfy only two jurisdictional prerequisites in order to bring suit against an employer under Title VII: first, he must file a complaint with the EEOC; and second, he must receive the statutory notice of the right to sue. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F.2d 1136 (5th Cir. 1971); *Flowers* v. *Local No. 6, Laborers International Union of North America*, 431 F.2d 205 (7th Cir. 1970); *Fekete* v. *U. S. Steel Corp.*, 424 F.2d 331 (3d Cir. 1970); *Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970); *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969). Moreover, four circuits have squarely held that an EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit. *Robinson* v. *Lorillard Corp., supra; Beverly* v. *Lone Star Lead Construction Corp., supra; Flowers* v. *Local No. 6, Laborers International Union of North America, supra; Fekete* v. *U. S. Steel Corp., supra.*

In this proceeding, Green satisfied the established prerequisites to a Title VII suit. His formal complaint to the EEOC stated that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." We hold that Green was entitled to judicial review of all grounds of employment discrimination alleged in his complaint to the EEOC, and that the district court's ruling to the contrary was erroneous.

IV

In anticipation of an adverse ruling on this issue, McDonnell argues that Green sustained no prejudice from the trial court's erroneous ruling because the trial court

actually considered the racial discrimination claim and ruled against Green on the merits. Therefore, the argument continues, the district court's decision should be affirmed despite this erroneous ruling.

We cannot accept McDonnell's suggestion that it should prevail on an issue that Green was not privileged to present. We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case, notwithstanding the commendable zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell. Additionally, as discussed in part V below, the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job. Instead, the district court simply assumed that, since the "lock-in" and "stall-in" protests were unprotected activities, McDonnell's refusal to rehire Green could not be violative of 42 U.S.C. §2000e-2(a)(1). The district court said:

> It must be remembered that so far as the Civil Rights Act goes, the employer may discharge or refuse to reemploy for any reason, except discrimination or because of practices made unlawful under Title VII. The testimony and evidence before the court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activities. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall-in" and the "lock-in" demonstrations. The burden of proving other reasons was on the plaintiff. [318 F.Supp. at 850].

We think it is clear that an applicant for employment may be entitled to the protection of §2000e-2(a)(1) even

though he participates in activities which fall outside the protection of §2000e-3(a). These statutes apply to wholly different facets of the employment relationship. Section 2000e-3(a) serves peripherally in the scheme of Title VII to shield an employee or applicant from employer retaliation. Section 2000e-2(a)(1) expresses Title VII's primary promise—equal employment opportunities for all. It would be antithetical to the remedial purposes of the Act to interrelate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside §2000e-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by §2000e-2(a)(1).

In the light of this record, we deem it necessary to remand this case to the district court for reconsideration of the racial discrimination issue in accordance with the standards discussed below. On remand, the parties should be permitted to present such additional evidence as may be relevant to the issue.

V.

The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. Upon that hypothesis, and apparently because the pleadings did not require McDonnell to defend the charge that its refusal to rehire Green was racially motivated, McDonnell made little effort to show that Green's participation in the "stall-in" would affect his ability to perform the job or to work harmoniously with other employees and supervisors. We need to evaluate this position in light of our cases dealing with job discrimination based on race.

Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment

decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. *See Moore* v. *Board of Education of Chidester School District No. 59, Ark.*, 448 F.2d 709 (8th Cir. 1971). *See also Carter* v. *Galagher*, ... F.2d ... (8th Cir., No. 71-1181, Sept. 9, 1971). We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. *Marquez* v. *Omaha, Ford Division*, 440 F.2d 1157, 1162 (8th Cir. 1971). Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him. In this case, it is undisputed that Green possessed the requisite skills to perform the work for which he applied, and that McDonnell was seeking qualified applicants at the time it refused to hire him and continued to seek qualified applicants thereafter. Moreover, Green's prior performance with McDonnell had earned him a "satisfactory" rating.

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the require-

ments of the job. Here, McDonnell has not demonstrated by any testimony or other evidence that Green's participation in the "stall-in" would impede his ability to perform the job for which he applied. There is no evidence that Green's conduct would cause fellow employees or supervisors to refuse to cooperate with Green, thereby disrupting plant operations.[6]

In this connection, we note that McDonnell employs over thirty thousand men and women at its St. Louis plant. The record demonstrates that few employees were actually affected by the "stall-in." We recognize that an employee's participation in an activity such as a "stall-in" could impede his ability to work harmoniously in surroundings characterized by close personal, or working, relationships among employees or between employees and management. This problem might be present at McDonnell, but the record is bare on this point. This aspect of the case remains for further exploration. On remand, McDonnell will have the opportunity to present evidence on this matter.

We do not, as does the dissent, construe this remand as a command to McDonnell to rehire Green. The remand is required because the district court did not use the correct standard in determining whether McDonnell's refusal to rehire Green was racially motivated. If McDonnell can demonstrate that Green's participation in the "stall-in" in some objective way reflects adversely upon job performance, McDonnell's refusal to rehire Green will be justified. But, if McDonnell's refusal to rehire Green rests upon management's personal dislike for Green or personal dis-

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[6] We note also that the reasons advanced by McDonnell for refusing to rehire Green may be found to be pretextual, particularly since McDonnell advanced the unsupported charge that Green had "actively cooperated" in the "lock-in." *See* Judge Lay's concurring opinion, *infra*.

taste for his conduct in the civil rights field, Green is entitled to some relief.[7]

The amount of lost earnings claimed by Green is not great, *see* note 8, *supra*, [sic] but the parties regard this as an important case and have devoted substantial time and energy to its litigation. Although the litigation is still not completed, we deem it appropriate to allow appellant a reasonable attorney's fee for this appeal, to be taxed as costs, upon counsel's submission of an estimate of his fee containing details of his services and time spent on this appeal. *See* 42 U.S.C. § 2000e-5(k).

LAY, Circuit Judge, concurring.

I join in the reversal and remand. I do so for the reasons stated by Judge Bright and some others as well.

The court's order refusing plaintiff leave to amend his complaint and utilize discovery on the issue of racial discrimination because the E.E.O.C. had not based its finding of probable cause on this ground is conceded error. Argument is made that nevertheless the issue was tried by consent and that the trial judge found there was insufficient evidence to support plaintiff's claim. The ancient Hebrew expression, "They tie our hands and then reproach us that we do not use them," gives sufficient response here.

Trial counsel who is foreclosed from pleading and pursuing discovery of facts relating to a particular legal

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[7] The record shows that Green obtained reasonably equivalent employment subsequent to July 26, 1965, the date when McDonnell refused to rehire him. Under these circumstances, the district court may limit relief, if any is to be given, to damages based on Green's loss of earnings between July 26, 1965, and the date on which he acquired reasonably equivalent employment, which loss Green estimated to be between four and five thousand dollars.

theory is scarcely prepared to try the case on that theory. It is not realistic to urge that thereafter where facts pertaining to that theory are drawn into the case, the issue has been tried by consent and the party has no cause for complaint. If the adversary system means anything at all it is that lawsuits and issues are not designed to be tried by happenchance. To make inquiry as to what additional facts could have been shown is remote to the practicalities of the trial of any lawsuit. Preparation is the guts and heart of effective representation in any litigation. The very contemplation of trying a specific legal issue can trigger mental processes as to strategy in building documentary and testimonial proof of the case. The order of proof, as well as the direct and cross-examination, may well vary as the strategy to present the issues as planned. Without adequate preparation by interviewing the witnesses, by discovery of facts unknown, by collation of the facts, by marshalling the documentary evidence, by investigating the law as to the particular issue to be tried, it is little wonder that a trial court dismisses a suit for insufficient evidence. Here, the trial court passed on a claim that it earlier foreclosed from being raised in the pleadings and on which it had refused discovery. For the above stated reasons that finding must be reversed.

Turning to the issues tried, the record presents no evidence whatsoever that the plaintiff actively and illegally participated in the so-called "lock-in." Yet the company used this reason to support their rejection of Green as an employee. I deem this reason pretextual.

The record shows that one of the grounds stated by Mr. Windsor, defendant's Director of Personnel Services, for the refusal to hire Green was because he had "chained the doors of the Roberts Building." There is no evidence which supports this charge. On the day of the lock-in Green was engaged in protected picketing activities. He

was told by one member of the picketing group that someone was going to chain the doors of the Roberts Building. When Green arrived at the scene, the chain had either already been removed or officials were in the process of removing it. A complete stranger to this litigation did the chaining. Evidence of mere subjective approval of this incident at the time of trial is not proof of Green's direction or authorization of it. Only if it could be shown that a principal-agent relationship existed between Green and the active participants can their wrongdoing be imputed to him. *Cf. International Ladies Garment Workers Union* v. *N.L.R.B.*, 237 F.2d 545 (D.C. Cir. 1956). Since the company erroneously imputed the wrongdoing to Green, it would be compounding the error to allow the company to use these facts as a basis for refusal to hire. Thus the district court's reliance on this fact is clearly erroneous.

The trial court held that the "stall-in" and "lock-in" were "unprotected" activities on which the company based its refusal to hire. The trial court's opinion gives little analysis as to why these reasons were singled out to be the sole cause when the record is undisputed that the company was disturbed over Green's lawful picketing activities as well. These activities were cited by company officials to the E.E.O.C. as part of their motive for refusing to rehire Green as an employee. One has grave difficulty in coming away from analysis of the present record without the belief that the company's rejection of Green was based not so much on an isolated illegal protest but on Green's prolonged activity in bringing public attention to the company's alleged discriminatory practices. Blind acceptance of any non-discriminatory reason offered by an employer in a fair employment case would always preclude correction of any discriminatory practices otherwise existing. It has generally been said that an employer may refuse to hire or decide to fire any employee for any reason he chooses. Civil rights legislation and case law deal-

ing with discriminatory employment practices have added modification to these principles. Discriminatory motives even though they constitute only a partial basis for an employer's refusal to hire are not sanctioned. *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344 (7 Cir. 1970); *Armstead* v. *Starkville School Dist.*, 3 F.E.P. Cases 977, 982-983 (N.D. Miss. 1971); *Stebbins* v. *Keystone Ins. Co.*, 2 F.E.P. Cases 861 (D. D.C. 1970). In other words the protected activities of Green cannot give the employer even partial cause to deny the employment. It is argued that it is unrealistic to think that an employer must hire an individual who vigorously, and at times even unlawfully, challenges the company's fairness and integrity. The syllogistic conclusion is that the applicant has bit the hand he asks to feed him. Yet to the limit that the law protects an individual's right to protest unlawful discrimination, by exercise of free speech and free assembly, an employer is precluded from the use of coercive or intimidating sanctions to circumvent the law's protective cloak. The hard nut of it all is that the public interest to be carried out in the legislative requirement of fair and equal employment practices possesses a higher value than the likes or dislikes of a particular employer.

Thus, when an employee challenges his rejected employment as a violation of the civil rights law and makes a prima facie case of discrimination as has been done here,[1] the record must demonstrate more than a mere subjective reason, as Judge Bright authoritatively demonstrates, for the employer's action. The evidence must show that the employee's lawful activities under § 2000e-3a were in no part a motivating factor in the employer's decision and that the reason for the rejection is objectively related to job performance. Without this showing any reason could otherwise be used to mask the denial of protected rights.

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[1] Cf. *Marques* v. *Ford Motor Co.*, 440 F.2d 1157 (8 Cir. 1971).

JOHNSEN, Senior Circuit Judge, dissenting in part.

I

I agree with the holding in subdivision I of the majority opinion that Green's attempt to assert a claim under 42 U.S.C. § 1981 in 1970, for his layoff which occurred in 1964, was barred as a matter of limitations.

I also agree with the holding in subdivision II that the "stall-in" activity engaged in by Green against McDonnell constituted an unlawful form of protest and was without any right of protection under 42 U.S.C. § 2000e-3(a).

I further agree with the holding in subdivision III that the district court was mistaken in its initial view and ruling that Green could not make assertion in his complaint of a claim that he had been denied rehiring because of his race, since the Equal Employment Opportunity Commission had not made a finding that reasonable cause existed to believe that this basis had underlain McDonnell's refusal to rehire him. The question has not been passed upon by the Supreme Court, but such an array of decisions by the lower federal courts exists thereon that I think it presently must be regarded as accepted law that where charges of violation of Title VII of the Civil Rights Act of 1964 have been lodged with the Commission, and the Commission thereafter notifies the complainant that it has not been able (for whatever reason) to effect compliance in respect thereto, the failure of the Commission to make a finding of reasonable cause on some particular charge does not preclude that charge from being asserted as a claim in a suit brought under § 2000e-5.

II.

I am not, however, able to agree with the holding in subdivision II that Green had no such part in the "lock-in" activity involved as to enable it to be regarded as an unlawful form of protest on his part against McDonnell.

The "lock-in" was the focal point of a demonstration which was planned and put on against McDonnell by an activist organization calling itself ACTION. Green was chairman or head of the organization. In organizing the demonstration, it would be only natural conduct, as common experience is able to attest, that the members would communicate and discuss with Green, as their chairman and leader, the activities which were organizationally to be engaged in. Further, the record to me carries sufficient implication that this was indeed the actual fact of the situation. There is no testimony that Green had delegated to anyone the role of serving as leader of the ACTION group for the occasion or that anyone had presumed to take over and carry on this function for him. Green admitted having knowledge that a part of what was going to be done was to chain and padlock the doors of the office building.

The building housed a part of McDonnell's offices, and a staff of McDonnell's exployees was working in it at the time. I should have supposed that, within common experience, no one could have any difficulty in believing that the primary objective of the affair was to be the locking up of McDonnell's employees in the building, and that it was because of this unlawful aspect that the matter was taken up with Green as the organization's head.

The majority opinion passes all this off with the mere statement that "The record does not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration". The concurring opinion, apparently to give this a bit of bolstering, engages in adding:

> "The record shows that one of the grounds stated by Mr. Windsor, defendant's Director of Personnel Services, for the refusal to hire Green was because he had

'chained the doors of the Roberts Building'. There is no evidence which supports this charge. On the day of the 'lock-in', Green was engaged in protected picketing activities. He was told by one member of the picketing group that someone was going to chain the doors of the Roberts Building. When Green arrived at the scene, the chain had either already been removed or officials were in the process of removing it. A complete stranger to this litigation did the chaining. Evidence of mere subjective approval of this incident at the time of trial is not proof of Green's direction or authorization of it. Only if it could be shown that a principal-agent relationship existed between Green and the active participants can their wrongdoing be imputed to him".

I have some difficulty with these statements. I pause on them only because they appear to be accepted and made part of the majority opinion, by Judge Bright's statement therein, "*See* Judge Lay's concurring opinion, *infra*". Thus the position of the majority seems to be that no responsibility for the chaining of the doors can properly be attributed to Green because, from his own testimony, he did not personally do the act and McDonnell did not show that he had commissioned the others to do it for him.

I think this overlooks the reality that the demonstration was not one made by a mere aggregation of separate individuals, each of whom was intendedly free to carry out his own aims and engage in such personal actions as he might see fit. As I have indicated, it was conduct engaged in by the membership of ACTION as a body. It was concerted action planned and taken by the organization. It was heralded and was intended to have attribution and credit given to the organization ACTION. It was action carried on by those who went to the scene as the membership body of ACTION. Its focal point was intended to

be the chaining and padlocking of the doors of the building. Because of the character of this aspect, it would be only natural, as I have said, within ordinary experience, that it should be and had been taken up with Green in his organizational prerogatives.

To repeat—like the district court, I have no difficulty regarding it as a rational inference, (1) that the communication with Green was done for the purpose of having him give assent and authorization thereto; (2) that with the chaining and padlocking being carried out as planned, Green had in fact given it such approval and authorization; and (3) that further, with no other reason or basis being shown therefor, Green's presence at the scene could only have been for the purpose of constituting a participation by him in the organization's intention and action of chaining the doors of the building and of giving any direction and other assistance necessary to have it accomplished.

Thus, in my view, McDonnell could properly regard Green as having responsibility for the chaining and padlocking and as having intended this to constitute a targeting on his part of McDonnell. In the unlawfulness of the act, his responsibility as to McDonnell would be a personal one; it could not be shunted off by him on the basis of official cloak or shield. I am therefore not quite able to understand how it can realistically be said that all Green did was "to make a mere subjective approval of this incident at the time of trial". It seems to me that in making reversal of the trial court's finding as to Green's responsibility for the "lock-in" action, the majority have engaged in artificiality.

III

McDonnell's right to consider the question of rehiring Green thus was, in my opinion, entitled to have as its basis both the "lock-in" and the "stall-in" action which had

been engaged in against it. The majority opinion merely makes reference to the "stall-in" situation; it does not set out the facts. Rows of cars were lined up across all four of the public highways from which entrance had to be made to the McDonnell plant area. The blockades were set up just before a shift of some 10,000 employees was due to arrive for work. The plant, with its total of over 30,000 employees, was being operated in three shifts. The members of the shift which the 7:00 a.m. one was to replace would thereupon be leaving for their homes.

It is not difficult to envision—and indeed it seems to me that McDonnell could hardly escape having concern for this aspect—what consequence the blockade could and presumably was intended to effect, in its public significance, in its substantial disruption of plant operation, and in natural reaction on the part of the vast number of employees whose right of ingress and egress were sought to be thwarted. It happened that these consequences were averted, not by any change in conscience on Green's part, but by the prompt action of the police in breaking up the blockade and in placing Green under arrest. The record does not enable any subjective immunity to be accorded Green on the "stall-in" events, as has been done in relation to the "lock-in" action, for Green chose not to try public-wise to deny or to justify the unlawful action of tying up general highway traffic and seeking to prevent 10,000 of McDonnell's employees from getting to their work, but elected instead to engage in the expedient of pleading guilty and being permitted to pay a fine of $50.00 for the traffic violation.

It was both the "stall-in" and the "lock-in" situations with which McDonnell was faced when Green presented himself at its personnel office and made application for one of the newly-opened jobs that had been advertised. As noted, I think both of these situations were properly entitled to be given consideration by McDonnell on the

question of rehiring Green. The majority have now, however, closed the door upon McDonnell's right to give any consideration to the "lock-in" affair. But even on the "stall-in" situation alone, I should not suppose that a Gallup poll would be needed to show that any employer with self respect and with concern for his relations with his other employees hardly would hire a workman, whether white or black, who had engaged in such an unlawful and indicative misdeed against him, against his employees, and against his business being permitted to operate.

I am therefore not able to see how any presumption of racial discrimination would legally be capable of attaching or could rationally be given application to such a situation. Green could have no right to have the question of hiring consideration dealt with in these circumstances differently than would be done by McDonnell in relation to any other person, white or black, who had engaged in such unlawful conduct against it. It is familiar fact that whites, as well as blacks, have through the years engaged in illegal acts, such as the "stall-in" and "lock-in" here and other possession-takings and worse, against particular businesses and employers, for varying reasons, sometimes personal, sometimes social, and sometimes political.

But whatever the reason therefor, one who has committed such unlawful deeds against some business and then seeks to be hired by it, does not, in my opinion, stand in any different position or have any right to different treatment because he is a black, than if he were a white, in relation to the right of refusal to hire him. Of course, racial motivation may not enter into such a situation in relation to a black. On the prima facie aspect, however, created by the commission of the illegal deeds here involved, it cannot, in my judgment, properly be held that nevertheless if the perpetrator has been a black, the situation should be regarded as one of prima facie racial discrimination.

IV

But the majority opinion goes still farther in its holding in subdivision V. If I read the statements in this subdivision correctly, together with some of those appearing in subdivision IV, the effect of the court's holding is that, even though the actual reason for McDonnell's refusal to hire Green was the unlawful acts which he had committed against it and no racial motivation was involved therein, this would not be able to constitute a justification for its not hiring him.

In subdivision IV, the statement is made that "Additionally, as discussed in part V below, the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job". Subdivision V then goes on to declare:

> "When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. Here, McDonnell has not demonstrated by any testimony or other evidence that Green's participation in the 'stall-in' would impede his ability to perform the job for which he applied. There is no evidence that Green's conduct would cause fellow employees or supervisors to refuse to cooperate with Green, thereby disrupting plant operations".

I had thought the question in the case was whether, in the denial of employment to Green, the situation either was one in which McDonnell had acted with some racial motive, or otherwise was one in which there did not exist an equal opportunity for Green to get a job with a white

person that had engaged in doing the same things against it Green had done. Under Title VII, no racial discrimination may exist as to Negro employment, either actually in the form of racial bias or operatively in not producing the same degree of employment opportunity with a white person (other than in a respect recognized by the statute).

The effect of the majority holding is, as I view it, that even though no racial motivation was in fact involved on the part of McDonnell, and even though its refusal to hire anyone who had engaged in such unlawful acts against it as were involved would not afford Green any less opportunity for employment than it did a white who had engaged in the same unlawful acts against it, McDonnell could nevertheless not refuse to hire Green unless his presence in the plant would disrupt its operations.

The holding purports to be predicated on a sentence in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited". But this sentence may not be read apart from the one which immediately precedes it: "The [1964 Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation".

The thrust of *Duke*, as I read it, is that, within the purpose and scope of the 1964 Act, a lack of equal opportunity, and hence a discrimination, is created by an employer's utilization of practices, procedures or tests which, even though not so intended, operatively produce the result of keeping blacks from obtaining jobs or of not being able to progress to other jobs or classifications the same as whites, where the things so utilized are without any significant relationship to a performance of the work involved.

I do not see in this a warrant for a holding that refusal by an employer to hire a person who has engaged in such

illegal conduct against it, as is here involved, is entitled to be deemed to operate as a lack of equal opportunity in employment, if the one who has done the misdeeds is a Negro. Surely, the majority does not mean to say that a Negro will not have equal opportunity for employment within the intent of Title VII unless unlawful acts committed by him against a business or an employer are required to be condoned, although American concepts have never required such a business condonation as to a white.

I take the liberty of adding a word, in realistic certainty and not in mystic prophecy, as to what the significance and result of the majority's holding will actually be. While the opinion allows McDonnell "the opportunity to present evidence" on whether Green's "stall-in" misdeeds "could impede his ability to work harmoniously in surroundings characterized by close personal, or working, relationships among employees or between employees and management", that opportunity can hardly under the indications and intimations of the opinion, constitute more than a theoretical and hollow one to McDonnell.

The opinion says that McDonnell must be able to make proof "in some objective way" that Green's presence in the plant would disrupt its operations. Testimony on the part of McDonnell's officials as to what their opinion would be on this aspect would not be able to meet the court's prescription, in light of its further declaration that "employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination".

Nor would I think that McDonnell could properly go around in the plant and undertake to canvass its employees on how they would feel if Green were to be rehired. And if McDonnell did presume to do so, one would have to be naive to expect that an employee who might have feelings or concern would be willing to make such an expression—

although within factory life he might not hesitate to manifest his attitude toward Green upon a favorable opportunity presenting itself in the plant for personally doing so. Beyond this, even if some employee might be willing to so declare and testify, this would only carry the situation onto the side track of a charge of racial bias being hurled against him.

What the court has held can therefore, in my opinion, only mean that McDonnell is being required to rehire Green.

V.

The opinion contains still another ground for making reversal. I have previously indicated my agreement that the district court was mistaken in its initial view and ruling that Green was not entitled to make assertion in his complaint of a claim that he had been denied rehiring because of his race. I am not able, however, in the circumstances shown by the record, to agree with the holding in subdivision IV that the initial striking from the complaint of Green's allegation of racial motivation entitles him to a reversal of the judgment.

Despite the district court's initial pleading ruling, Green was allowed discovery in respect to McDonnell's requirements for employment, on the nature of the tests and interviews given, on the exemptions made therefrom, and on the weight accorded to the ratings arrived at from these processes, as they existed at the time of his application for rehiring. He had access to and introduced evidence at the trial on what the racial composition of the work force at the plant had been during a substantial number of years, and as to the applications, terminations, status changes, classifications, et cetera, which had been involved as to nonwhite persons. He was permitted to give detailed testimony at the trial on his own employment history at the plant, including all incidents which

he regarded as having racial significance, such as conversations had with him about the matter of his personal grooming and the attire worn by him. Indeed, such was the volume of this that the majority opinion takes occasion to note "the commendable zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell".

It is clear to me that at the trial the district court did not adhere to its initial pleading ruling. It is also clear that Green's counsel, from the evidence which he adduced at the trial, did not regard himself as being subject to any such restriction. It further is clear from the character and scope of Green's personal testimony that he had such familiarity with the plant as to provide rational basis for inferring that he could and would have produced instances of discriminatory practices if these had existed in the plant.

The district court appraised all of the evidence thus produced and found that it did not indicate or suggest that "defendant was motivated by racial prejudice in its refusal to rehire Green". The court recognized and declared in its Memorandum that the "controlling and ultimate" considerations in the situation were whether the "stall-in" and "lock-in" actions of Green were "the real reason for defendant's refusal to rehire the plaintiff", and whether, if they were, this could constitute sufficient basis legally to "justify defendant's refusal to rehire the plaintiff".

The majority take the abstract position here, that "We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case". With the lack of adherence to its pleading ruling which the district court engaged in; with the scope and character of the discovery

which the court allowed; and with the nature and extent of the evidence which Green's counsel produced at the trial—the practical effect of the majority's holding can only be that the district court must now accord Green the full extent of the discovery which he sought. To me, Green was allowed sufficient representative information—part of whose character and scope I have indicated above—so that no reversible error existed in the court's denial of his burdensome and harassing initial request to be given access to some 200,000 general McDonnell files or of his later request to be permitted to go through some 70,000 individual employment files. The denials which the court made and the alternatives which it allowed in relation to Green's requests seem to me to be well within the scope of the judicial discretion which the court had a right to exercise in the situation.

Again, I do not hesitate to state that I am certain, that, after all the discovery has occurred to which Green has now been given access, no more objectivity is likely to be produced thereby than that which can be argued to exist in the representative information, figures, et cetera, to which Green has had access and which he adduced at the trial.

VI

For the reasons I have indicated, I respectfully must dissent from the reversal made of the judgment, and to each of the three separate grounds on which it has been predicated.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 20,596

Percy H. Green,
Plaintiff-Appellant,
v.
McDonnell Douglas Corporation,
Defendant-Appellee.

On Petition for Rehearing.

Before JOHNSEN, LAY, and BRIGHT, Circuit Judges.

May 12, 1972

ORDER ON PETITION FOR REHEARING

In response to a petition by McDonnell Douglas Corporation for a rehearing, the majority of the court have decided to modify the court's opinion by striking Part V thereof and substituting a revised Part V, which is set forth below.

Judge Lay joins in the revised opinion and adheres to his prior separate concurring opinion.

Judge Johnsen dissents and files a supplemental dissenting opinion, which is set forth below.

In light of these modifications, the court denies McDonnell Douglas Corporation's petition for a rehearing en

banc for the reason that the petition has failed to obtain the vote of a majority of the Circuit Judges who are in regular active service. A rehearing before the panel is likewise denied.

The denial of the rehearing is without prejudice to the right of either party to file a petition for a rehearing on the court's modified opinion.

No. 20,596. Percy H. Green v. McDonnell Corporation.

REVISED OPINION

BRIGHT, Circuit Judge.

V

The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. Upon that hypothesis, and apparently because the pleadings did not require McDonnell to defend the charge that its refusal to rehire Green was racially motivated, McDonnell rested its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him.

Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. *See Moore* v. *Board of Education of Chidester School District No. 59, Ark.*, 448 F.2d 709 (8th Cir. 1971). *See also Carter* v. *Gallagher*, ... F.2d ... (8th Cir., No. 71-1181, Sept. 9, 1971). We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In enacting Title VII, Congress

has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. *Marquez* v. *Omaha, Ford Division*, 440 F.2d 1157, 1162 (8th Cir. 1971). Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him. In this case, it is undisputed that Green possessed the requisite skills to perform the work for which he applied, and that McDonnell was seeking qualified applicants at the time it refused to hire him and continued to seek qualified applicants thereafter. Moreover, Green's prior performance with McDonnell had earned him a "satisfactory" rating.

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.

Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in", as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual,[8] or otherwise show the presence of racially

[8] McDonnell advanced an unsupported charge that Green had "actively cooperated" in the "lock-in." *See* Judge Lay's concurring opinion, *infra*.

discriminatory hiring practices by McDonnell which affected its decision.

The district court did not use appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated. On remand, both parties will have the opportunity to present evidence on this matter.

The amount of lost earnings claimed by Green is not great,[7] but the parties regard this as an important case and have devoted substantial time and energy to its litigation. Although the litigation is still not completed, we deem it appropriate to allow appellant a reasonable attorney's fee for this appeal, to be taxed as costs, upon counsel's submission of an estimate of his fee containing details of his services and time spent on this appeal. *See* 42 U.S.C. § 2000e-5(k).

No. 20,596.

Green v. McDonnell-Douglas Corp.

JOHNSEN, Senior Circuit Judge, in supplemental dissent.

Modification and substitution has now been made as to subdivision V of the previously-filed majority opinion. For convenience and facilitation in checking whether this represents anything more than a language change, I set out the modifications.

A

The statements in the second and third sentences of the first paragraph of the subdivision as previously filed, reading,

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[7] The record shows that Green obtained reasonably equivalent employment subsequent to July 26, 1965, the date when McDonnell refused to rehire him. Under these circumstances, the district court may limit relief, if any is to be given, to damages based on Green's loss of earnings between July 26, 1965, and the date on which he acquired reasonably equivalent employment, which loss Green estimated to be between four and five thousand dollars.

"• • • McDonnell made little effort to show that Green's participation in the 'stall-in' would affect his ability to perform the job or to work harmoniously with other employees and supervisors. We need to evaluate this position in light of our cases dealing with job discrimination based on race",

have been changed to read,

"• • • McDonnell rested its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him."

B

Paragraphs 3, 4, and 5 of the subdivision as previously filed, reading,

"When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. Here, McDonnell has not demonstrated by any testimony or other evidence that Green's participation in the 'stall-in' would impede his ability to perform the job for which he applied. There is no evidence that Green's conduct would cause fellow employees or supervisors to refuse to cooperate with Green, thereby disrupting plant operations.

"In this connection, we note that McDonnell employs over thirty thousand men and women at its St. Louis plant. The record demonstrates that few employees were actually affected by the 'stall-in'. We recognize that an employee's participation in an activity such as a 'stall-in' could impede his ability to

work harmoniously in surroundings characterized by close personal, or working, relationships among employees or between employees and management. This problem might be present at McDonnell, but the record is bare on this point. This aspect of the case remains for further exploration. On remand, McDonnell will have the opportunity to present evidence on this matter.

"We do not, as does the dissent, construe this remand as a command to McDonnell to rehire Green. The remand is required because the district court did not use the correct standard in determining whether McDonnell's refusal to rehire Green was racially motivated. If McDonnell can demonstrate that Green's participation in the 'stall-in' in some objective way reflects adversely upon job performance, McDonnell's refusal to rehire Green will be justified. But, if McDonnell's refusal to rehire Green rests upon management's personal dislike for Green or personal distaste for his conduct in the civil rights field, Green is entitled to some relief.",

have been changed to read (omitting here the footnote),

"When a black man demonstrates that he possesses the qualifications to fill a job opening and that he has been denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.

"Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the 'lock-in' and the 'stall-in', as reasons for its refusal to rehire Green. Green should be given the

opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racial discriminatory hiring practices by McDonnell which affected its decision.

"The district court did not use appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated. On remand, both parties will have the opportunity to present evidence on this matter."

C

I am not certain as to the intended effect of these changes, and I suspect that the district court also will have difficulty in trying to assess the significance of the substituted language.

Thus, while the previous indication in the first paragraph of the subdivision has been stricken that McDonnell was required "to show that Green's participation in the 'stall-in' would affect his ability to perform the job or to work harmoniously with other employees and supervisors," the statement has been left standing in subdivision IV that "Additionally, as discussed in part V below, the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job."

Further, the language used in the third paragraph of subdivision V, as to the burden resting on McDonnell "to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job" and that "McDonnell has not demonstrated by any testimony or other evidence that Green's participation in the 'stall-in' would impede his ability to perform the job for which he applied", has now been changed to read, "However, an applicant's past participation in unlawful

conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer".

The difficulty I have with all this is that the opinion continues to adhere to the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved, although they would entitle and would cause it to do so in the case of white persons. In taking the position that such unlawful and immediate misdeeds do not of themselves, even though no racial motivation is involved, provide a sufficient basis for McDonnell to refuse to hire Green, the majority thus are holding, not that Green is entitled to the same opportunity as a white, but that he is entitled to one of a different and greater degree.

As indicated in my original dissent, I am not able to read Title VII of the Equal Employment Opportunity Act of 1964 as providing for such an inherently different employment opportunity or such a curbing employer prescription, nor do I believe that Congress, as a matter of respect for law adherence, would presume to impose such a requirement of business condonation upon employers in respect to the commission of unlawful acts against them, such as are here involved. And in the majority's holding that, even though no racial motivation was involved, McDonnell was not entitled to refuse to hire Green because of his unlawful misdeeds against it, but that something more than this would have to exist in the situation, I confess that I am not able to see any practical difference, so far as McDonnell's situation is concerned, between the opinion's original statement, that it must be shown that the hiring of Green would result in "disrupting plant operations" and its substituted statement that "an applicant's past participation in unlawful conduct directed at its

prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer".

Any proof that would be possible in attempting to show that Green would be an industrial handicap to the operation of the plant, would necessarily involve opinion or subjective testimony which, as pointed out in my original dissent, the majority opinion declares to be of "little weight in rebutting charges of discrimination".

I do not desire to prolong this discussion further, except to reiterate, as noted in my original dissent, that I believe the majority have engaged in a mistaken interpretation of the holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). I adhere to my original dissent, with this supplemental expression added.

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

No. 20596 September Term, 1971

Percy H. Green,
Appellant,

vs.

McDonnell-Douglas Corp., etc.,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered renewed petition for rehearing en banc filed by counsel for appellee, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly divided Court.

Treating the petition for rehearing en banc as also being intended as a petition for rehearing to the original panel in the case, the petition for rehearing is denied by such panel, with Johnsen, Senior Circuit Judge, dissenting.

June 28, 1972

APPENDIX D

United States District Court
E. D. Missouri, E. D.

Sept. 25, 1970

Percy H. Green, Plaintiff,

v.

McDonnell-Douglas Corporation, Defendant.

No. 68 C 187(2).

MEMORANDUM

MEREDITH, District Judge.

This case was tried by the Court and this memorandum constitutes the Court's findings of facts and conclusions of law.

Plaintiff, Percy H. Green, filed suit against defendant, McDonnell-Douglas Corporation, alleging that defendant violated section 704(a) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-3(a)] by refusing to accept plaintiff for employment because of his involvement in civil rights activities and because he opposed practices made an unlawful employment practice by law. The Civil Rights Act of 1964 became effective on July 2, 1965.

Defendant contends that the refusal to reemploy plaintiff stems not from his past civil rights activities, but from his participation in a "stall in" in which access to the defendant's plant was blocked and his participation in a protest at which defendant's employees were padlocked in the building at which they were employed.

Plaintiff had been employed by defendant, McDonnell-Douglas Corporation, since 1956. Plaintiff was a qualified mechanic, who had been rated average by his supervisors at McDonnell-Douglas Corporation.

In 1962, plaintiff inquired about transferring from his union job to the non-union job of laboratory technician in the Electronic Equipment Division. Plaintiff spoke with Edward Sinecki, supervisor of laboratory services in the department, who explained the work and cautioned him of the danger of a layoff because of the sacrifice of union seniority and that work in the department was expected to decline. At that time plaintiff decided to remain at the position he then held.

In 1963, plaintiff reapplied to work in the Electronic Equipment Division. He talked to Mr. Sinecki and Bob Godefroid, who reiterated the discussion of the previous year about the possibility of layoff and the short term of the project upon which they were working. The plaintiff's manner of dress was discussed and he was cautioned of the informal policy of the department as to working attire, because of the number of visitors touring the department.

Plaintiff took the job and was assigned work similar to that performed by others in his grade and experience.

As evidence of discrimination, plaintiff contends that upon transferring he was given no tour of the department or training as was given to other employees. While the evidence is not conclusive that plaintiff received the tour, there is enough evidence in the record to satisfy this Court that he received the tour as a customary practice of the company. Training was not given the plaintiff because he possessed adequate training for the job. This was a standard practice of the company and was not discriminatory.

Plaintiff has been active and publicly involved in civil rights activities since the early 1960's. His testimony was

that he had participated in various protests, including the climbing of the Gateway Arch, while employed at McDonnell. This protest activity is relied upon by the plaintiff to show that officials at McDonnell had knowledge of his activities and were laying him off because of these activities. The evidence shows that plaintiff's civil rights activities were not considered as a factor in the decision to lay off the plaintiff.

In the spring of 1964 with the completion of the Gemini simulator program, several people from the department were laid off; plaintiff was not included.

Later it became evident that more technicians were to be declared "surplus", so a semiannual ranking of employees by means of a "totem pole" was made in accordance with company policy. The "totem pole" was used for pay and promotional purposes and as a job evaluator.

After determining the men to be declared "surplus", an effort was made through the personnel department to relocate the men in various other departments. A voluntary test was given to help determine the qualifications of the men for higher job classifications which were open. Plaintiff refused to take the test.

Meetings with company officials were requested by plaintiff to discuss his layoff. Plaintiff indicated at these meetings that he felt he was being laid off because of his race and civil rights activities. Representatives of the defendant assured the plaintiff that this was not so. An investigation of the plaintiff's layoff was conducted by Mr. Krone, vice president of personnel, who ascertained that the layoff was due to a reduction in work force and not because of racial discrimination. Plaintiff also expressed the idea that because he was black and because of his prominence in civil rights activities, he should receive preferential treatment in the layoff. The defendant continued to search for a job for plaintiff in the company.

This task was made more difficult in that the evidence showed that plaintiff insisted that any job found for him must involve no reduction in job status or be the equivalent of his then present position. With plaintiff's exacting standards and the work force reduction, the defendant failed in finding a job for the plaintiff. On August 28, 1964, plaintiff was laid off with eight other technicians.

After being laid off, plaintiff initiated protests by writing letters, filing charges, picketing, and various other means to protest his layoff. These various protest activities culminated in a demonstration in October of 1964. Plaintiff and other members of the Congress on Racial Equality organization stalled their cars on the main roads leading to defendant's plant at the time of a shift change. The second demonstration led by plaintiff was at the Roberts Building and resulted in the employees of the defendant being locked in the building at quitting time.

The "stall in", as described in defendant's Exhibit A, was, in summary: five teams, each consisting of four cars would "tie up" five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Acting under the "stall in" plan, plaintiff drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a. m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily.

Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.

The "lock in" arose out of a demonstration on July 2, 1965, in which plaintiff, as chairman of ACTION, a civil rights organization, was in charge of a picket line demonstration against McDonnell. On the way to this demonstration, a member of ACTION told plaintiff that he was planning to chain the front door of the Roberts Building, which housed employees of McDonnell. Plaintiff did not instruct him to refrain. During the demonstration, a chain and padlock were placed on the front door of the Roberts Building, and as a result, the defendant's employees were locked in the building. Plaintiff testified that he approved of chaining the door.

On July 26, 1965, plaintiff applied for work at McDonnell. Although plaintiff was qualified for the job, he was not hired. The defendant based its rejection of the plaintiff on his participation in the "stall in" and the "lock in" demonstrations.

The plaintiff raises two causes of action in his post-trial briefs. First, that the defendant discriminated against him in the layoff under 42 U.S.C. § 1981 because of his race and civil rights activities. Second, that defendant refused to rehire the plaintiff because of his race, participation in civil rights activities and opposing practices made unlawful under the Civil Rights Act of 1964, thus, violating 42 U.S.C. §§ 1981 and 2000e-3(a).

The Court finds that the issue of discrimination in the layoff is being raised for the first time in the post-trial briefs. The plaintiff's layoff claim is not pled in his amended complaint, nevertheless, the Court will consider it.

Plaintiff's layoff claim is based on his employment contract with the defendant. Although 42 U.S.C. § 1981 contains no statute of limitations, the applicable state statute controls. Glasscoe v. Howell, 431 F.2d 863 (8th Cir. Aug. 12, 1970); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970); Butler v. Sinn, 423 F.2d 1116 (3rd Cir. 1970); Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962). The Missouri statute of limitations for employment contracts is five years. See, V.A.M.S. 516.120. Plaintiff was laid off on August 28, 1964. He did not introduce or offer at trial any evidence to substantiate this claim. The five-year period has expired. The Court finds that the claim is barred by the statute of limitations.

The Court will next consider the plaintiff's claim with regard to the defendant's refusal to rehire the plaintiff.

Before filing suit, plaintiff complied with the statutory requirements of 42 U.S.C. § 2000e-5 of complaining first to the Equal Employment Opportunity Commission. Plaintiff filed a charge with the EEOC that he was discriminated against because of his race and because of his civil rights activities. The EEOC found that there was probable cause to believe that plaintiff was discriminated against in not being rehired only because of his civil rights activities.

The plaintiff contends that defendant violated 42 U.S.C. § 2000e-3(a) because of his opposition to employment practices made unlawful by Title VII of the Civil Rights Act of 1964. Plaintiff also contends in his post-trial brief that defendant's refusal to rehire him was based on race and his participation in civil rights activities, which is a violation of 42 U.S.C. § 1981.

The Court feels that the Court's discussion of the case under 42 U.S.C. § 2000e-3(a) will effectively dispose of any claim arising under section 1981. Section 42 U.S.C. § 2000e-(a) provides:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The Court approaches this issue hearing in mind that the purpose of Title VII is to eliminate the inconvenience, unfairness, and humiliation of discrimination in employment. United States v. Medical Society of South Carolina, 298 F. Supp. 145, 151 (D.S.C. 1969).

In the matter before the Court, the controlling and ultimate fact questions are: (1) whether the plaintiff's misconduct is sufficient to justify defendant's refusal to rehire, and (2) whether the "stall in" and the "lock in" are the real reasons for defendant's refusal to rehire the plaintiff. The Court finds that they are.

Violations of the Civil Rights Act, like the National Labor Relations Act, depends on the employer's intent at the time of the decision. N. L. R. B. v. Ace Comb Co., 342 F.2d 841, 846 (8th Cir. 1965). It must be remembered that so far as the Civil Rights Act goes, the employer may discharge or refuse to reemploy for any reason, except discrimination or because of practices made unlawful under Title VII. The testimony and evidence before the Court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activities. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall in" and the "lock in" demonstrations. The burden of proving

other reasons was on the plaintiff. The plaintiff has not sustained this burden.

The plaintiff contends that his protest activities are protected by the First Amendment right to freedom of speech. The blocking of public streets and the locking in of defendant's employees does not come within the protection of the First Amendment. Communication of ideas by picketing and marching on streets is not afforded the same kind of protection under the First Amendment as is pure speech. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

The plaintiff could, of course, protest and try to persuade the defendant to rehire him, however, the right to engage in protests does not encompass unlawful acts. N. L. R. B. v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S. Ct. 490, 83 L.Ed. 627 (1939). Protest must be kept within reasonable limits if it is to be protected. Impeding the flow of traffic into or from an employer's plant exceeds such reasonable limits. Title VII of the Civil Rights Act of 1964 does not protect such activity as employed by the plaintiff in the "stall in" and "lock in" demonstrations. The evidence shows that plaintiff, who participated in many civil rights activities from 1960 through the time he was laid off in 1964, received no criticism from his employer because of these activities.

The plaintiff's actions are analogous to picketing in labor disputes. In labor law, picketing, as a general rule, is unlawful where either its object or its method is unlawful. The blocking of access to or exit from employer's place of business is not protected as lawful protest. N. L. R. B. v. Perfect Circle Co., 162 F.2d 566 (7th Cir. 1947). The Court finds that conduct such as the plaintiff's, which creates situations fraught with danger to other employees or to the general public, is not protected by Title VII. This type of conduct would justify a refusal to reinstate a striking

employee in labor law. See W. J. Ruscoe Co. v. N. L. R. B., 406 F.2d 725 (6th Cir. 1969); Oneita Knitting Mills, Inc. v. N. L. R. B., 375 F.2d 385 (4th Cir. 1967); Victor Products Corp. v. N. L. R. B., 93 U.S.App.DC. 56, 208 F.2d 834 (1953); N. L. R. B. v. Longview Furniture Co., 206 F.2d 274 (4th Cir. 1953); W. T. Rawleigh Co. v. N. L. R. B., 190 F.2d 832 (7th Cir. 1951).

The plaintiff argues that his offenses are of a minor nature and that no property damage occurred. The fact that no personal injury or property damage occurred was due solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's demonstration and were at the scene to remove plaintiff's car from the highway. In the "lock in", if an emergency had occurred, the blocking of access to the outside of the building would have been disastrous. The evidence shows that plaintiff participated in both demonstrations knowing full well the consequences of his conduct. The plaintiff argues that he "did not chain the doors in the 'lock in' ". Nevertheless, those who actively cooperate with offenders who exceed the permissible scope of protest are equally to blame and forfeit the right to be rehired by the defendant. N. L. R. B. v. Fansteel Metallurgical Corp., 306 U.S. 240, 261, 59 S.Ct. 490, 83 L.Ed. 627 (1939); W. J. Ruscoe Co. v. N. L. R. B., supra. To order the rehiring of plaintiff, who has been guilty of such serious act of misconduct, cannot reasonably be said proper action to effectuate the policies of Title VII. To hold that plaintiff is entitled to be rehired is to put a premium on misconduct of this type and to encourage like conduct on the part of others. The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of this exercise, not to license them to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers.

The Court finds and concludes on the record before it:

(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.

(b) Plaintiff's layoff claim under 42 U.S.C. § 1981 is barred by the statute of limitations.

(c) The Civil Rights Act does not protect activity which blocks entrance into or from an employer's plant or office.

(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire.

A judgment will be entered dismissing plaintiff's complaint with prejudice.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

QUESTION PRESENTED

Did the Court of Appeals improperly interpret antidiscrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a prima facie showing of bias, then will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity?

STATUTES INVOLVED

This case involves the construction and interpretation of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e et seq., and particularly Section 2000e-5(g), which provides as follows:

> "If the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

This suit was instituted in the district court by respondent Green under Title VII of the 1964 Civil Rights Act ("The Act"), 42 U.S.C. Section 2000e et seq., which was designed to provide equal employment opportunities. Respondent, a black man, contended that petitioner McDonnell violated the Act because it refused to hire him when he applied for a job as a mechanic in July, 1965. Respondent was admitted by petitioner to be qualified for the position available. He had a high school education, had taken eleven (11) courses offered by petitioner, and, with the exception of 21 months in the Army (during which he also took courses), had been employed by petitioner from 1956 until his lay-off in 1964. He had a "secret" security clearance, his job ratings were good, and one supervisor testified that he was even qualified to be a Class A Laboratory Technician.

Green was a member of CORE, a civil rights group organized to achieve the objectives, inter alia, of Title VII. In October, 1964—prior to the formation of ACTION, of which respondent was later chairman (note petitioner's error on this point)—Green participated in a CORE-sponsored demonstration designed to call public attention to McDonnell's discriminatory employment practices, during which Green and others attempted to stall their cars on an access route to petitioner's plant. Only a few hundred commuters were effected for about ten minutes, and Green was arrested for obstructing traffic. The "stall-in" was located from one-fourth mile to two miles from petitioner's plant, according to various witnesses. Green pleaded guilty to the misdemeanor charge, and paid his fine of $50.00.

On July 2, 1965, a participant in an ACTION-sponsored protest demonstration outside one of McDonnell's buildings chained and padlocked the building's main door. By

the time Green arrived on the scene, the chains were being removed.

Three weeks later, McDonnell ran advertisements in the St. Louis, Missouri, newspapers seeking qualified electrical mechanics. Green applied for one of these positions, but McDonnell, though still seeking qualified mechanics, refused to hire him.

On March 30, 1972, a three-judge panel of the Eighth Circuit, one judge dissenting, reversed the district court and remanded for a new trial. Petitioner filed a timely Petition for Rehearing En Banc, which resulted in a modification by the panel of Point V of the majority opinion and which also produced a supplemental dissent by Judge Johnsen. In view of the modification, McDonnell's Petition for Rehearing was overruled without prejudice to the filing of another request for rehearing on the modified opinion. McDonnell's renewed Petition for Rehearing En Banc was denied by an evenly divided vote of the Court En Banc on June 28, 1972.

The modified opinion of the Court of Appeals held, first, that the district court had erred in imputing to Green any illegal conduct pertaining to the "lock-in" incident; second, that the district court had erred in striking Green's allegation of racial discrimination on the ground that the EEOC had not made a reasonable cause finding concerning such discrimination; and the appellate court thereafter discussed the legal issues raised by this suit with considerably more craftsmanship than petitioner gives it credit for. Respondent respectfully refers this Court to that opinion, 463 F.2d 337.

It is to be noted that the Court of Appeals was unanimous in its finding that the district court had erred in construing the Act to preclude Green's allegation of racial prejudice. This basis for remand is not challenged here by petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED

The question presented is whether the Court of Appeals improperly interpreted anti-discrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a prima facie showing of bias, than will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity.

As noted, the Court of Appeals unanimously held that the trial court erred by striking respondent's allegation of racial bias. That holding, unchallenged here by petitioner, required remand. Since remand was required, the appellate court addressed itself to three closely related points upon which it felt guidance for the trial court was appropriate. Those points comprise the only question before this court and represent well-established doctrine.

First, when a black job applicant, alleging that his prospective employer refused to hire him due to racial bias, proves that he possessed the requisite skills for the unfilled position applied for, the applicant may rest his case, for he has made a prima facie showing in support of that allegation. **Green**, 463 F.2d at 352.

Second, once a prima facie showing of racial discrimination has thus been made, the burden shifts to the employer to prove the Constitutional and statutory bona fides of its refusal to hire.

Third, since "employers seldom admit racial discrimination", **Green**, loc. cit., citing **Marquez v. Omaha, Ford Division**, 440 F.2d 1157, 1162 (8th Cir. 1971), an em-

ployer's mere **denial** of such discrimination will carry little probative value on the question of whether such discrimination existed. Something of greater probative value, the appellate court instructed, is necessary. This cautionary note, far from announcing "novel evidentiary principles" (as petitioner claims, p. 8), is grounded in a realistic appraisal of what would happen to Title VII if its strictures could be thwarted by an employer's mere protestations of rectitude.

In carrying its burden of rebutting the inference that race was a motivating factor in its refusal to hire, the employer must provide the trial court with an "extenuating explanation." **Rowe v. General Motors Corporation**, 457 F.2d 348, 357 (5th Cir. 1972). That explanation must prove "non-discriminatory legitimate business necessity" (l.c. at 354), and carries greatest probative value when not "cloaked in generalities and vague criteria which do not measure an applicant's qualifications in terms of job requirements." **Green**, 463 F.2d at 352. As stated by this Court: "If an employment practice which operates to exclude Negroes cannot **be shown** to be related to job performance, the practice is prohibited." **Griggs v. Duke Power Co.**, 401 U.S. 424, 431 (1971). (Emphasis added)

The Eighth Circuit did no more than require McDonnell to show that its refusal to hire a qualified black while keeping the position open was justified by valid, objective, non-discriminatory business reasons. It did not hold that McDonnell could not justify its refusal to hire Green based on subjective evidence; it merely held that such reasons must bear a manifest relationship to the job and that objective factors are to be given greater weight than subjective factors. This holding is in accord with **Rowe**, supra; **Moore v. Board of Ed. of Chidester Sch. Dist. No. 59, Ark.**, 448 F.2d 709 (8th Cir. 1971); **Brown v. Gaston County Dyeing Machine Company**, 457 F.2d 1377

(4th Cir. 1971), and **Griggs**, supra. The crux of these decisions is that Title VII reaches "not only overt discrimination," **Griggs**, supra, 401 U.S. at 431, but also covert discrimination. If Title VII is to become anything more than an "illusory commitment" to equal employment opportunities, (**Green**, 463 F. 2d at 352) then courts will have to accord greater evidentiary weight to objective criteria than to subjective criteria. That was the crux of the appellate court's instructions here.

To put those instructions into perspective, it should be noted that McDonnell was permitted by the trial court to rest its case upon the assertion that Green had engaged in "unprotected" activity in his protests against its allegedly discriminatory employment practices. The appellate court reversed the trial court's finding that such activity, occurring during the July 2, 1965, "lock-in" demonstration, was imputable to Green, and this reversal is not here challenged by petitioner. The appellate court agreed with the trial court, however, that Green's participation in the "stall-in" (for which he was charged with a misdemeanor, plead guilty, and paid a nominal $50.00 fine) was "unprotected"—although neither court found "relevant authority" (**Green**, 463 F.2d at 341) for so holding, and neither indicated whether that holding gave consideration to the unique tempo of those times (Autumn, 1964), when frequently the streets provided the only platform from which civil rights advocates could obtain attention. Be this as it may, the appellate court went on to observe that McDonnell might have refused employment to Green for reasons other than his participation in the "stall-in"—an observation no doubt prompted by Green's erroneously-stricken allegation to that effect. To quote the opinion below: "Green should be given the opportunity to show that these reasons offered by the Company were **pretextual**, or otherwise to show the pres-

ence of racially discriminatory hiring practices by McDonnell which effected its decision." 463 F.2d at 353. (Emphasis added.)

The opinion below is sound, and the instructions from the appellate court are appropriate, flow directly from this Court's opinion in **Griggs**, supra, and should not be disturbed. Petitioner's somewhat hysterical treatment of the opinion below seriously misstates that holding and then engages in rather foolish extrapolations based on that misstatement. Stripped of its emotion and hyperbole, however, that Petition provides no substantial basis for granting the Writ.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit, filed on March 30, 1972, and the revised majority opinion and supplemental dissent filed on May 12, 1972, are re-

ported at 463 F. 2d 337 and are reprinted in Appendixes A and B (pp. A-1 through A-38) to the Petition for Writ of Certiorari filed in this case. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, filed on September 25, 1970, is reported at 318 F. Supp. 846 and is reprinted in Appendix D (pp. A-40 through A-49) to the Petition for Writ of Certiorari.

JURISDICTION

The original opinions of the three-judge panel of the Court of Appeals for the Eighth Circuit were filed on March 30, 1972. In response to petitioner's timely Petition for Rehearing en banc, the original majority opinion was modified on May 12, 1972, and rehearing was denied without prejudice to the right of either party to file a petition for rehearing addressed to the modified opinion. Petitioner then timely sought rehearing en banc on the modified opinion, which was denied by an evenly divided court on June 28, 1972. The Petition for Writ of Certiorari was filed on September 23, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Under Title VII, is an employer's right to refuse to hire a job applicant who has committed illegal and unprotected acts against the employer nullified or circumscribed merely because the applicant is black?

2. In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?

STATUTES INVOLVED

This case involves the construction and interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, (Public law 88-352), the relevant portions of which provide as follows:[1]

Section 2000e-2:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, §703(a)(1).

Section 2000e-2:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . ." Civil Rights Act of 1964, §703(j).

Section 2000e-3:

"(a) It shall be an unlawful employment practice for an employer to discriminate against any of his

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[1] This case arose under Title VII as it existed prior to the 1972 amendments (Public Law 92-261). It should be noted, however, that the 1972 amendments did not affect any of the statutory provisions or legal issues involved in this action.

employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Civil Rights Act of 1964, §704(a).

Section 2000e-5:

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title." Civil Rights Act of 1964, §706(g).

Section 2000e-7:

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." Civil Rights Act of 1964, §708.

STATEMENT OF THE CASE

Respondent Percy Green is a black citizen of St. Louis, Missouri. Petitioner McDonnell Douglas Corporation is an aerospace and aircraft manufacturer with its corporate headquarters in St. Louis County, Missouri, where it employs in excess of 30,000 people.

This case involves an individual claim of discrimination filed by respondent Green against petitioner McDonnell claiming that McDonnell violated Title VII of the 1964 Civil Rights Act ("the Act") when it refused to hire Green on July 26, 1965. This is not a class action or a "pattern or practice suit" but presents only the question of whether McDonnell violated the Act in refusing to hire Green. Respondent seeks reinstatement and back pay for himself as a result of petitioner's allegedly wrongful rejection of his employment application.

The original complaint filed in the District Court charged that McDonnell had refused to hire Green because of his opposition to petitioner's employment practices (A. 8). At trial, however, respondent presented extensive evidence in an attempt to establish that the decision was also motivated by the fact that respondent was black. In addition, Green also sought to prove that his previous layoff by McDonnell in 1964 was improperly motivated.

The District Court and the Court of Appeals properly held that the layoff claim, interjected for the first time at trial, was barred by the statute of limitations, and respondent has filed no cross-petition in this Court seeking review of that issue. Hence, the layoff is not before this Court. However, because the issue of racial discrimination against Green is allegedly involved in the refusal to rehire him, we will undertake here to trace Green's employment history with McDonnell, as found by the District Court. These findings were not disturbed by the Court of Appeals.

Events Leading Up to the 1964 Layoff

Respondent was originally hired by petitioner in 1956 (A. 52). He was a qualified mechanic, a member of the union, and was rated average by his supervisors (A. 323, 494). In 1962, he inquired about transferring from his union job to a non-union position in the laboratory department of the Electronic Equipment Division ("E.E.D.") (A. 58, 270). One of respondent's supervisors cautioned him against transferring out of his union status because of the danger of a layoff, the sacrifice of union seniority, and because the work in the department, connected as it was with the Gemini space project, was expected to decline (A. 100-02, 270, 342). At that time, respondent decided not to transfer but elected to remain at the position which he then held (A. 61, 102).

In 1963, Green reapplied for a position in the E.E.D. laboratory and was again cautioned about the hazards of such a move, which had increased because that department had neared completion of the Gemini simulator program (A. 62-63, 103-05, 272, 342). Nonetheless, he elected to take the job (A. 63) and was assigned work similar to that assigned to men with his grade and experience (A. 107, 287, 346). The record is replete with evidence that respondent was not treated differently by McDonnell than was anyone else (A. 271-74, 295-96, 344-46).

Green had been actively and publicly involved in civil rights activities and demonstrations since 1960 or 1961 and had received substantial publicity for some of his conduct (A. 69-70, 94, 208),[2] but such pursuits had not interfered

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[2] Green is no stranger to litigation as a result of his civil rights activities. See *e.g.*, *ACTION v. Gannon*, 450 F. 2d 1227 (8th Cir. 1971), involving the disruption of religious services and threats to defile religious sacraments; and *Koen v. Long*, 302 F. Supp. 1383, 1395 (E.D. Mo. 1969), *affirmed*, 428 F. 2d 876 (8th Cir. 1970), *cert. denied* 401 U.S. 923 (1971).

with his job and were not of any concern to McDonnell (A. 71, 239).

Some personnel in the E.E.D. were laid off in the spring of 1964, but respondent was not among them (A. 131-32, 288). But in August of 1964, because of the reduced manpower needs for the Gemini simulator program (A. 352), it became evident that more technicians had to be declared surplus, and the Company thereupon made reference to the standardized rating system known as the "totem pole," which had been compiled in April (A. 292, 319) and which was used as a guide for pay and promotional purposes and as a job evaluator (A. 289, 292-93, 354, 382, 441). Eighteen men, including respondent, were declared surplus (A. 352). Six of the men on the surplus list were higher than respondent on the totem pole (A. 353).

Efforts were made by petitioner, through its Personnel Department, to relocate these surplus men in various other departments to avoid having to lay them off (A. 110, 390, 396). In that connection, a voluntary test was administered to help determine the qualifications for men for higher job classifications which were open (A. 111, 394), but respondent refused to take the test (A. 355).[3] On August 28, 1964, Green was laid off together with eight other employees, all of whom were white and one of whom ranked higher than Green on the "totem pole" (A. 112, 292).

The "Stall-in" and "Lock-in"

After his layoff, and while McDonnell was still in the process of looking for alternative employment for Green,[4]

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[3] No evidence was presented as to the content of the test and no claim has been asserted by Green that the test was discriminatory.

[4] This task was complicated by Green's insistence that he receive preferential treatment and by his refusal to consider any job that involved a reduction in job status (A. 395-96, 444-45, 453).

he actively participated in a "stall-in" demonstration in October 1964, in which respondent and other members of CORE intentionally stalled their cars on the heavily traveled main roads leading to petitioner's plant at the time of a shift change (A. 399-403). The second demonstration led by respondent, in July of 1965, was at the Roberts Building, which housed some of McDonnell's offices, and resulted in some of petitioner's employees being locked in the building by the placing of a chain on the front door of the building (A. 132-33).

The "stall-in" was described in Petitioner's Exhibit "A" (A. 507-09, 329), and was not disputed by respondent. Five teams, each consisting of four cars, were to "tie up" five main access roads to the McDonnell plant at the time of the morning rush hour; the drivers of the cars were instructed to line up next to one another so as completely to block intersections and roads (A. 510). They were instructed to stop their cars, turn off the engine, pull the emergency brake, raise all windows, lock the doors and remain in their cars until the police arrived (A. 508). The plan was to have the cars remain in that position for one hour (A. 508).

Acting pursuant to this plan, a copy of which was in his possession, respondent drove his car onto Brown Road (a two-lane access road to the McDonnell plant) at approximately 7:00 a.m., at the start of the morning rush hour (A. 126-27). Respondent was aware of the traffic problems that would result (A. 127). He stopped his car on purpose with the intent to block traffic (A. 129-30). His car was in good running order but he refused to move it voluntarily (A. 129). Respondent's car was towed by the police, and he was arrested for obstructing traffic, a misdemeanor under Missouri law (A. 131). Respondent pleaded guilty to the charge of obstructing traffic and was fined fifty dollars (A. 177).

The "lock-in" arose out of a demonstration on July 2, 1965 in which respondent, as chairman of ACTION, another civil rights organization, was in charge of a picket line demonstration against McDonnell (A. 132). Prior to the demonstration, a member of ACTION stated his intention to chain the front door of the Roberts Building, which housed employees of McDonnell (A. 132). Respondent, the leader of the group, did not instruct him to refrain from this act (A. 132-33) and the door was in fact chained, locking petitioner's employees inside the building (A. 132-33). Respondent, as chairman of the group, testified that he approved the chaining of the door (A. 133).

The Employment Application

On July 26, 1965, three weeks after the lock-in, respondent applied for a job at McDonnell as a mechanic, a position for which he was qualified (A. 84). His application was forwarded the same day to R. C. Krone, McDonnell's Vice President of Personnel, and C. L. Windsor, the Director of Personnel Services, who rejected it on the spot (A. 405, 499). The District Court found that McDonnell refused to rehire Green because of his participation in the stall-in and lock-in.[5] 318 F. Supp. at 850.

When asked for his reasons for not rehiring Green, Windsor pointed unequivocally to the stall-in and lock-in (A. 405). Krone testified that Green had disqualified himself as a desirable employee by reason of the stall-in, which he characterized as "an overt act to disrupt the normal activities of our company tantamount to sabotaging our plant" (A. 455, 501).

Respondent filed a complaint with the EEOC contending that he had been denied re-employment because of his

[5] For the reasons set forth below in Point I.B., the principles involved in this case are the same whether the stall-in is considered alone or in conjunction with the lock-in.

race and because of his involvement in the civil rights movement. The EEOC found reasonable cause to believe that § 704(a) of the 1964 Civil Rights Act had been violated by McDonnell in refusing to employ Green because of his involvement in civil rights activities. The Commission made no finding with respect to the allegation premised on racial discrimination.

Pre-Trial Matters

Respondent's original complaint filed in the District Court contained allegations only that McDonnell had "intentionally engaged in an unlawful employment practice by having denied plaintiff employment because he has opposed practices made unfair employment practices by the law governing equal employment opportunities" (A. 8-9). Although, as noted, respondent did not purport to bring a class action, he nevertheless embarked promptly on a massive discovery campaign seeking access to and reproduction of literally hundreds of thousands of McDonnell records. Green filed interrogatories ("Set No. 2") requesting information concerning a period nearly eight years long detailing the composition of McDonnell's work force broken down by job classification and race, and sought further information about job transfers and promotions (A. 11). The information sought would have encompassed 662,000 applications for employment, 110,000 actual employment records in 1,400 job classifications (A. 17). It was estimated that the compilation of such information would require the services of three people working full-time for approximately three to six months (A. 17).

The District Court, on petitioner's objections, held these interrogatories to be oppressive and irrelevant (A. 18), following which respondent filed a motion to produce

essentially the same documents and information (A. 18). The court held that certain documents relating to respondent's application and testing of applicants would be required to be produced, but sustained objections to the remaining requests on the grounds of relevancy, stating, *inter alia*: "There is no allegation in the complaint that the reason the plaintiff was not employed was because he is a Negro" (A. 24).

The court held that good cause had not been shown for the production of over 70,000 files but did require the production of documents showing the requirements for initial employment, the written tests required, the oral tests or interviews required, those exempt from oral tests or interviews, the purpose of the tests or interviews, and the weight given to the rating resulting from such an interview or test as they existed in July 1965, when respondent applied for employment (A. 25).

It was at that point, following the discovery orders, that respondent filed an amended complaint asserting, for the first time, discrimination on account of race in addition to discrimination based upon civil rights activities (A. 25). Petitioner moved to strike the racial allegations on the ground that the EEOC had not made an affirmative finding of probable cause on that issue (A. 28). The District Court, relying on legislative history in a then-uncharted area, sustained the motion and held that an affirmative finding by the EEOC was a condition precedent to the institution of a federal court action (A. 31). Sometime thereafter, a significant trend of decisional law developed reaching the opposite conclusion, and it is clear from the record that the District Court thereafter departed from its ruling, and that the parties actually tried the issue of racial discrimination by consent. Under Rule 15(b) of the Federal Rules of Civil Procedure, the

pleadings were thus to be treated as though the racial issue had been raised, and any error in striking the allegations of the amended complaint was rendered harmless.[6]

The Trial

The case was tried on the merits for four days before the District Court sitting without a jury. The record is replete with evidence offered by respondent attempting to establish that both the layoff and the refusal to rehire were inspired by prejudice against him because of his race and color and because of his civil rights activities. Green filled the record with evidence concerning purported discrimination against him because of his attire (A. 59, 62, 97-99, 368). He also made repeated references to the racial composition of McDonnell's work force and of departments therein (A. 68-69, 72-73, 109-10, 156, 168, 297, 362-64, 464-67, 578). The racial climate at Cape Kennedy was even interjected into the case (A. 153-54, 311). There were also various references to charges of racism filed by Green with numerous agencies, including the EEOC, the President's Committee on Civil Rights, the Missouri Commission on Human Rights, the Department of Justice, the Department of the Navy, the Department of the Defense and the Office of Federal contract Compliance (A. 80-81, 228). And respondent's counsel cross-examined McDonnell's officers as to their own personal views about integration and racial discrimination (A. 360-61, 379, 414-15, 425-26, 456-57, 491-92).

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[6] Petitioner supplied respondent with all of the relevant material sought to be discovered by the motion for production and the interrogatories (A. 232-33, 267), and respondent at trial withdrew his *subpoena duces tecum* for Krone (A. 267). Nevertheless, Green on his appeal urged error in various pre-trial discovery orders entered by the court. The Court of Appeals, however, did not reverse any of the District Court's discretionary discovery rulings, and Green has not sought review of those issues here.

Respondent also put into evidence an analysis of the racial composition of petitioner's work force since 1943, which included a 13-page statistical breakdown for the relevant years concerning terminations, status changes, training, applications, job classification, longevity and miscellaneous other information relative to petitioner's non-Caucasian employees (Pl. Ex. 33, Tab 30).

It is abundantly clear that the issue of race discrimination was actually tried by the parties. The Memorandum Opinion of the District Court analyzed all of the evidence so submitted, and the Court of Appeals praised respondent's counsel for his resourcefulness. With respect to the layoff and the discussions which followed, the District Court noted that "plaintiff indicated at these meetings that he thought he was being laid off because of his race and civil rights activities." In stating the contentions presented by the evidence and by Green's post-trial brief, the trial court characterized them as follows:

> ". . . that defendant refused to rehire plaintiff because of his race, participating in civil rights activities and opposing practices made unlawful under the Civil Rights Act of 1964 . . ." 318 F. Supp. at 849.

The District Court observed that respondent urged racial discrimination as a basis for recovery but found, on a plenary record, that the stall-in and lock-in supplied the motivation for McDonnell's decision and that these activities were not protected by Title VII. Accordingly, it held that respondent was not denied employment because of his race or his legitimate opposition to McDonnell's employment practices, and judgment was entered for petitioner (A. 45).

The Appeal

Respondent appealed the District Court judgment to the Eighth Circuit, and oral arguments were heard by a three-judge panel on April 15, 1971. On March 30, 1972, each

member of the panel filed a separate opinion. The majority opinion, concurred in by two members of the panel, remanded the case to the District Court for further proceedings in accordance with the rules promulgated by the opinion. The majority opinion held (1) that the District Court was correct in determining that the layoff claim was barred by the statute of limitations; (2) that the District Court properly determined that the stall-in and lock-in were not protected activities under Title VII; (3) that the court's pre-trial order striking allegations of racial discrimination from the complaint was erroneous; (4) that this error was not harmless; and (5) that McDonnell's admitted reliance on the stall-in and lock-in were not sufficient reasons to justify its refusal to hire Green because petitioner did not establish the adverse affect of these demonstrations on Green's ability to perform the job applied for.

In remanding the refusal-to-hire aspect of the case to the District Court, the appellate court held that respondent had made a *prima facie* case of racial discrimination by showing that he was black and qualified for the job. The burden, according to the majority, then passed to McDonnell to prove by "objective evidence" that the reasons given for not hiring Green would adversely affect his ability to function as a mechanic. The concurring opinion disputed the District Court's finding that Green actively participated in the lock-in, and this observation was apparently made a part of the majority opinion. The only effect of this holding is to question whether McDonnell's connection of Green to the lock-in was accurate. The majority opinion of Court of Appeals did not set aside the finding that McDonnell was in fact motivated by the stall-in and lock-in but merely questioned the extent of Green's involvement in the lock-in and held that McDonnell was not entitled to rely on the lock-in.

Judge Harvey Johnsen dissented from each of the portions of the majority opinion which ruled adversely to petitioner. He stated that the majority had engaged in "artificiality" in its discussion of the lock-in issue but observed that whether the stall-in is considered alone or in conjunction with the lock-in, the District Court was absolutely correct in holding that McDonnell had a perfect right to reject respondent on the basis of the stall-in alone:

> "I should not suppose that a Gallup Poll would be needed to show that any employer with self-respect and with concern for his relations with his other employees hardly would hire a workman, whether white or black, who had engaged in such an unlawful vindictive misdeed against him, against his employees, and against his business being permitted to operate." 463 F. 2d at 348-49.

The dissent noted that a white person would not be entitled to a presumption of racial discrimination in identical circumstances and challenged the majority holding that a Negro applicant can make a *prima facie* case simply because he is black. Emphasizing that there was no suggestion of any racial motivation in the record, the dissent characterized the majority opinion as follows:

> "The effect of the majority holding is, as I view it, that even though no racial motivation was in fact involved on the part of McDonnell, and even though its refusal to hire anyone who had engaged in such unlawful acts against it as were involved would not afford Green any less opportunity for employment than it did a white who had engaged in the same unlawful acts against it, McDonnell could nevertheless not refuse to hire Green unless his presence in the plant would disrupt its operations." 463 F. 2d at 349-50.

The dissenting opinion took issue with the majority's erection of preferential standards for minorities and with

its misreading of this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The dissent also observed that the erroneous shift of the burden plus the preclusion of subjective evidence has made it impossible for McDonnell to defend this action. "What the court has held can, therefore, in my opinion, only mean that McDonnell is being required to rehire Green." 463 F. 2d at 350.

McDonnell filed a timely petition for rehearing and on May 12, 1972, the panel majority issued a "revised opinion" containing some primarily linguistic modifications of Point V of the original opinion, to which Judge Johnsen filed a supplemental dissent. As authorized by the order denying the original rehearing petition (A. 49), McDonnell renewed its request for an en banc determination, which was denied by a 4-to-4 vote of the Court en banc on June 28, 1972 (A. 49).[7]

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[7] After the Petition for Certiorari was filed here, counsel for Green submitted to the Court of Appeals a "statement" for counsel fees in connection with the appeal. On November 2, 1972, the three-judge panel, over petitioner's objections and without a hearing, awarded respondent an attorney's fee, with Judge Johnsen again dissenting. (See Docket Entries, A. 6.)

SUMMARY OF ARGUMENT

The Court of Appeals has drastically departed from the spirit and the letter of Title VII and has rewritten time-honored rules of procedure and evidence by announcing (1) that a black man establishes a *prima facie* case of racial discrimination by showing that he is black and qualified for a job, and (2) that the burden then shifts to the employer to prove by "objective" evidence that the reasons offered for not hiring the applicant were substantially related to the requirements of the job.

The language and history of Title VII clearly require the complainant to prove that the employer's challenged action was impermissibly tainted by discriminatory motivation. The Eighth Circuit, however, has held that the burden is immediately transferred to the employer to prove the absence of discrimination once a black complainant has established his race and qualifications. This rule is premised solely upon the color of the applicant, and its benefits are not available to white persons. It thus ignores Title VII's policy of color-blind equality and requires reverse discrimination.

The Court of Appeals has also held that once the burden has shifted, the employer may justify his refusal to hire a black applicant only on the basis of the applicant's ability to perform the job applied for. Petitioner's refusal to hire respondent was based upon respondent's illegal and unprotected activities directed against petitioner's operations and employees. These factors are racially neutral in conception and in operation, and do not create arbitrary racial barriers, but the Court of Appeals mistakenly relied upon *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), to require that McDonnell's rejection of Green, to be legal, must be based solely upon job-related factors. Such a re-

quirement is violative of §706(g), which specifically sanctions *any* employment decision made for *any* reason "other than discrimination on account of race, color, religion, sex or national origin or in violation of §704(a)." The unlawful misconduct engaged in by Green provided substantial reason for McDonnell to refuse to hire him because Title VII does not restrict the right of an employer to refuse to employ those who have interfered with the employer's operations and harassed his employees.

Finally, the Eighth Circuit erred in discrediting McDonnell's explanation of its motivation for rejecting Green's application. The majority opinion held that "subjective" evidence offered by an employer is essentially unworthy of belief, and that the employer must establish his defense by an objective demonstration. This holding runs afoul of the self-evident proposition that the employer is the best source of information as to the motivation for his decision and that he should, therefore, be allowed to testify on his own behalf as to why the action was taken. The trier of fact should be permitted to hear *all* the relevant evidence and determine the credibility of the witnesses and weigh their testimony. In a case in which a determination of motivation is critical, the fact finder cannot properly perform his function without considering credible "subjective" evidence.

ARGUMENT

I. An Employer Has the Right Under Title VII to Refuse to Hire a Job Applicant Who Has Committed Illegal and Unprotected Acts Against That Employer Even Though the Applicant Is Black.

It has long been recognized in labor law and civil rights cases that an employer may refuse to hire any person for good reason, bad reason or no reason, absent discrimination. See, *e.g., Truax v. Raich*, 239 U.S. 33 (1915); *Tims v. Board of Education of McNeil, Arkansas*, 452 F. 2d 551 (8th Cir. 1971). The effect of the majority opinion below is to repudiate this precept as regards minorities and to permit an employer to refuse to hire a prospective employee for good reason, bad reason or no reason *unless he is black*, in which case the employer will be presumed to have discriminated and will be required to show by "objective" evidence that the reason given was related to the applicant's potential job performance.

Petitioner submits, in accordance with the dissenting opinion in the Court of Appeals, that the rules formulated by the majority, predicated as they are solely upon the race of the applicant, subvert both the spirit and the letter of Title VII.

A. The Fact That Respondent Is Black Does Not Create a Prima Facie Case of Discrimination or Relieve Respondent of the Burden of Proving That Petitioner's Refusal to Hire Him Violated Title VII.

The cornerstone of the modified majority opinion of the Court of Appeals is contained in the following sentence:

> "When a black man demonstrates that he possesses the qualifications to fill a job opening and that he

has been denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination." 463 F. 2d at 353.

The effect of this holding upon the instant case, and upon civil rights cases generally, would appear to be twofold. First, as a practical matter, it effectively shifts the burden of proof, in cases where a black man is involved, from the plaintiff job applicant to the defendant employer. And second, it effectively discriminates in favor of a black man and against other job applicants. We submit that the Court of Appeals erred in promulgating this principle.

American jurisprudence has traditionally imposed upon the plaintiff the burden of proving his case. Nothing in the language or the legislative history of Title VII provides even the slightest intimation that any attempt was made by Congress in that statute to change the ordinary rules of proof. On the contrary, a Title VII action was expressly and consistently contemplated by Congress as proceeding "in the usual manner" with complainant having the affirmative burden of proving discrimination. See 110 Cong. Rec. 2560, 6549, 7212-14, 8350, 11848, 15866.[8] In the context of this case, then, respondent was required by the Act to establish by a preponderance of the evidence that he was refused employment because of his race or color or because of his lawful opposition to McDonnell's employment practices.

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[8] During the debates on the House floor, the following explanation of the burden of proof was offered by one of the bill's proponents: "The burden would be on the complainant to show that there had been discrimination . . . The burden all the way would be on those who alleged the discrimination. It is not the opposite; it is not a situation in which a charge can be brought against an employer and thereafter the employer would have to prove that he had not discriminated. He would not have a burden. It would be the other way around." 110 Cong. Rec. 2560.

The District Court, properly apportioning the burden in the historically accepted manner, found that respondent, despite four days of trial, 690 pages of testimony and the introduction of 47 exhibits, had failed to sustain his burden of showing that McDonnell's rejection of his employment application was motivated by respondent's race or by his legitimate opposition to petitioner's employment practices. The District Court, having observed the demeanor of the witnesses and having assessed their veracity, found that the evidence clearly showed that McDonnell's decision was inspired by the stall-in and lock-in and, therefore, that the refusal to hire was validly based upon Green's unprotected misconduct.

The Eighth Circuit did not in terms disturb the finding that the stall-in and lock-in were in fact the basis for McDonnell's action (although challenging the extent of Green's participation in the lock-in) and agreed with the holding that such activities are not protected by Title VII.[9] The District Court's findings were overwhelmingly supported by the evidence,[10] but the appellate court disapproved the standards applied by the trial court and remanded the case for further proceedings.

According to the Eighth Circuit majority, respondent established a *prima facie* case of racial discrimination

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[9] Hence, both lower courts have properly conformed to this Court's pronouncement in *City of Greenwood v. Peacock*, 384 U.S. 808, 826 (1966): ". . . [N]o federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street."

See also, *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Commonwealth of Pennsylvania v. Hill*, 313 F. Supp. 1159 (W.D. Pa. 1970) and *Commonwealth of Pennsylvania v. Leonard*, 315 F. Supp. 215 (W.D. Pa. 1970), *both affirmed sub nom. Hill v. Commonwealth of Pennsylvania*, 439 F. 2d 1016 (3d Cir. 1971), *cert. denied* 404 U.S. 985 (1971).

[10] See the discussion in Point II, *infra*, relative to the Court of Appeals' criticism of the *type* of evidence offered by McDonnell.

merely by showing that he was black and qualified to fill a job opening which was denied him. Color alone, the Court held, can create a presumption of discrimination, and the employer must then come forward to prove the absence of a discriminatory animus. A white applicant-plaintiff in identical circumstances would not survive a motion for a directed verdict on such a meager showing, but a black plaintiff is said to be entitled to a presumption *simply* because of his color.

It must be borne in mind that the aim of Title VII is *equality of* employment *opportunity*, not a guarantee of employment. It was designed to be color-blind in its operation and to eliminate race as a factor in employment decisions. Congress, in Section 703(j) (42 U.S.C. § 2000e-2(j)), pointedly cautioned against preferential treatment for any group. Yet, in carving out special rules for blacks, the Court of Appeals has in actuality required discrimination against whites and has critically impaired the right of employers to make valid nondiscriminatory employment decisions. In the terminology of the supplemental dissent below,

> "... The majority thus are holding, not that Green is entitled to the same opportunity as a white, but that he is entitled to one of a different and greater degree." 463 F.2d at 355.

Under the Eighth Circuit's rule, if fifty technically qualified people—49 whites and one black—applied for a job and if, as would seem probable mathematically, one of the whites were hired for perfectly nondiscriminatory reasons, the Negro applicant would automatically have a *prima facie* case under Title VII, but the rejected whites would not. Even if no one were hired, the black applicant would be presumed to have been discriminated against on account of his race, but none of the white applicants could avail themselves of such an advantage. Such results, be-

sides being illogical, are totally at odds with the statutory purpose.[11]

In *Griggs v. Duke Power Co., supra,* at 430-31 this Court said:

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. ***Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.*** What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification."[12]

In Section 706(g), the Act specifically exempts from its proscriptions any employment decision which is made for any reason other than race, color, religion, sex or national origin or in violation of § 704(a). The Act is directed only against *discriminatory* decisions. In the Interpretive Memorandum submitted by the Floor Managers of the Act, the proponents stated, 110 Cong. Rec. 7213:

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a

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[11] A further problem arises by virtue of the fact that, while the Eighth Circuit's rule is stated in terms of a "black man," it must be remembered that the statute which it purportedly implements covers not only race and color but also sex, religion and national origin. The fallacy of the rule can be further demonstrated by postulating an application for employment by a qualified Baptist laborer. If he were refused a job, he could recover even though the employer was completely unaware of his religious affiliation. Similar incongruous results would eventuate in the case of women and, say, Canadians.

[12] Emphasis ours here and throughout this brief except as otherwise noted.

distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin. Any other criterion or qualification for employment is not affected by this title."

Discrimination, as prohibited by Title VII, means intentionally departing from normal procedure when dealing with minorities. Therefore, in order for a black plaintiff to establish a *prima facie* case of individual discrimination, in the absence of an unlikely admission of prejudice by the employer or, perhaps, a history of overwhelmingly pervasive exclusion of blacks from the employer's work force, the plaintiff must offer proof either (a) that he was intentionally treated differently than a white person was or would have been treated under the same circumstances or (b) that some inherently discriminatory standard was applied to him. In the context of an application for employment, it would seem essential to an individual black plaintiff's *prima facie* case to show either that a white man with lesser qualifications was hired instead of him or that his own qualifications were measured by a biased caliper.

The placing of such a burden on a Title VII claimant by Congress does not require him to prove facts peculiarly within the knowledge of the employer but merely means that he must be able to point to *some* facet of the transaction which indicates a departure by the employer from regular procedure and which creates a permissible inference that the employer's decision was improperly influenced by a discriminatory factor. The mere fact that the applicant is black does not satisfy that requirement.

The purpose of Title VII is indeed wholesome and salutary, and in fact its proper implementation is essential to

the realization of the ideal of true equality. Because the Act was born of compromise, however, its reach was intentionally confined, a circumstance which has caused some of the lower federal courts to believe that judicial revision and amplification is desirable. With respect to the issues presented by this case, however, the Court of Appeals' burden-of-proof rule does not further Title VII's mandate but in fact leads to results which are diametrically opposed to the expressed statutory purpose. Petitioner submits, in accordance with the dissent below, that the Eighth Circuit has sponsored favoritism rather than equality and, by its creation of presumptions based on race, has sanctioned reverse discrimination.

B. There Is No Requirement Under Title VII That an Employment Decision, Racially Neutral in Conception and Operation, Must Be Based Only Upon Job Performance.

The Eighth Circuit majority opinion appears to hold that the stall-in and lock-in could not be relied on by McDonnell as reasons for rejecting Green's application unless it could prove some connection between those activities and Green's ability to be a mechanic.[18] This holding, like the burden-of-proof rule, was presumably prompted solely by respondent's status as a Negro and is thus subject to the same legal and logical infirmities discussed above in Subsection A.

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[18] The original and revised majority opinions both contained the statements that "the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job," and "the record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required." 463 F. 2d at 342, 343, 352. This language seems to nullify the effect of the revised opinion's deletion of that portion of Section V containing an express requirement for tying the reason to the job. See the supplemental dissent, 463 F. 2d at 355.

1. This Case Does Not Fall Within the Rule of Griggs v. Duke Power Co.

The sole authority cited by the appellate court in support of its "job-related" requirement is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). With due deference to the Court of Appeals, we submit that the majority opinion is predicated upon a distorted reading of *Griggs* and represents an extension of Title VII which is totally unjustified by the history or the language of the statute or by the *Griggs* decision.

Griggs was a class action against an employer with a history of overt pre-Act discrimination. The issue presented to this Court was the validity of two standardized employment practices, *i.e.*, the requirement of a high school diploma and the successful completion of two general aptitude tests. These were employer-erected barriers to employment which, though neutral on their face and not intended to be discriminatory, "operated to render ineligible a markedly disproportionate number of Negroes." *Id.* at 429.

The purpose of Title VII, the Court stressed, was to achieve equality of employment opportunity and to remove roadblocks that historically had favored whites over blacks. The Court held that Negroes' substandard performance on the tests was directly traceable to race because of the inferiority of schooling which had been provided through the years for members of their race. Since the Act is designed to remove artificial, arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race, it therefore prohibits not only overt discrimination but also practices which are fair in form but discriminatory in operation. Also proscribed are practices, procedures or tests neutral on their face and neutral in terms of intent "if they operate to 'freeze' the status quo of prior dis-

criminatory employment practices." *Id.* at 430. The Court expressly disclaimed any suggestion that the employer's intent is irrelevant in a Title VII case, but held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

The gist of *Griggs* was thus only that an employer has the burden of showing that any standardized job requirement *which has a tendency to reduce job opportunity because of race* has a demonstrable relationship to the job in question. The unanimous *Griggs* decision has no application to the issues presented in the instant case. Here the District Court was called upon to analyze not the validity of procedures or tests but simply the motivation of an employer in refusing to hire a single individual. The behavior to be scrutinized in this case is not that of the employer in formulating general practices which result in arbitrary barriers to employment, but that of the would-be employee who is seeking the benefits of the Act. The condition in which respondent finds himself here is not the regrettable result of years of racial subjugation and was not caused by publicly sanctioned deprivation of adequate education or training. His failure to gain employment with McDonnell resulted from his intentional and purposeful illegal activity.

Finally, we are not here concerned with an inherently discriminatory employer act, practice or decision, either as intended or as implemented. It goes without saying that any individual—whether black or white, Catholic or Protestant, male or female—who committed the deeds engaged in by Green would have been denied employment by any self-respecting employer against whom they were directed. There is no inherent or subtle discrimination in a decision not to hire a saboteur, and thus the "job-

related" test of *Griggs* does not come into play because of the absence of "built-in headwinds for minority groups." Clearly, the rejection of a white applicant under identical circumstances would not be required to be evaluated in terms of job performance, and the rules should not be changed solely on the basis of applicant's color.

2. Section 706(g) Permits Any Non-discriminatory Business Decision Made for Any Reason, Whether or Not Based Upon Job Performance.

The Eighth Circuit's approach to racially neutral employer decisions, discriminatory neither in their form nor in their consequences, is unrealistic and would produce bizarre results antithetical to the philosophy of Title VII. It deprives the employer of his legitimate right to make business decisions based upon valid, non-discriminatory business considerations. It further ignores the specific language of Section 706(g) of the Act, which provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or payment to him of any back pay, if such individual was . . . refused employment . . . *for any reason other than* discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a)."

Like the National Labor Relations Act ("NLRA"), Title VII was obviously intended "to leave unscathed a wide range of employer actions taken to serve legitimate business interests." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311 (1965).

The legislative history of Section 706(g) is instructive as to the Congressional intent. As originally drafted, the bill read much like § 10(c) of the NLRA (29 U.S.C. § 160(c)), in that it insulated only those employer actions

taken for "cause." The Celler Amendment, recognizing the limited purpose of the proposed legislation, struck the word "cause" from the bill, so that *any* employer action would expressly be beyond the pale of the Act if taken "for any reason other than discrimination on account of race, color, religion or national origin."

Representative Celler, the floor manager of the bill, explained his amendment, 110 Cong. Rec. 2567:

> "Mr. Chairman, the purpose of the amendment is to specify cause. Here, the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race, color, religion or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin."[14]

The amendment, eventually adopted, was also characterized as clarifying the employer's right to discharge an employee for ineptness or drunkenness (110 Cong. Rec. 2570), or because he drank or smoked or swore (*Id.* at 2603).

Significantly, during the debate on Title VII, another amendment was offered which would have prohibited a union from giving a preference to any applicant in certain programs for "reasons other than *job qualifications*" and reasons which might be indirectly discriminatory on the basis of race. (110 Cong. Rec. 2593.) The amendment, while praised for its humanitarian aspirations, was denounced by Title VII proponents as not being germane to the issue of race discrimination (*Id.* at 2594, Remarks of Reps. Roosevelt and Griffin), and was defeated (*Id.* at 2595). Hence, Congress considered and rejected the very concept espoused below by the Court of Appeals.

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[14] Sex was added later as a classification of discrimination.

There is simply no foundation in law, equity or common experience for the Eighth Circuit's holding that the stall-in and lock-in must affect Green's future job performance in order to validate McDonnell's rejection of his application.[15]

3. The "Stall-in" and "Lock-in" Justified Petitioner's Refusal to Hire Respondent.

As noted, Section 706(g) is comparable to but even more explicit and restrictive than § 10(c) of the NLRA, which prohibits the reinstatement of any individual or payment to him of any back pay if he was suspended or discharged for just cause. In *Fibreboard v. N.L.R.B.*, 379 U.S. 203, 217 (1964), the Court observed that § 10(c) was intended to dispel the notion that "engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules and engage in incivilities and other disorders and misconduct." The Court held in addition that § 10(c) was "designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." Neither does Title VII authorize prospective employees to engage in opprobrious misconduct against a company and then allow them to charge "bias" when their applications meet the fate which they should have readily anticipated.

A full rejoinder to Green's contentions was given in *Glover v. Daniel*, 318 F. Supp. 1070, 1075 (N.D. Ga. 1969), *affirmed* 434 F.2d 617 (5th Cir. 1970):

> ". . . [W]hile a teacher undoubtedly has the right to disagree with the boss and even to tell him off, *it has nothing to do with race to say that he does so at*

[15] Even in public employment, it is clear that job performance need not be the sole yardstick for measuring the fitness of an employee. *Beilan v. Board of Education of Philadelphia*, 357 U.S. 399 (1958).

his peril. Unquestionably, the First Amendment gives a teacher the right to speak his mind; *but it does not give him the right to disrupt a school* or to choose its principals *or to sabotage its programs.*"

McDonnell's rejection of respondent was not attributable to his status as an innocent victim of history or of his environment. Rather he had shown himself to be devoted to the disruption of McDonnell's operations. "There is no more elemental cause for discharge of an employee than disloyalty to his employer." *N.L.R.B. v. Local Union 1229, I.B.E.W.*, 346 U.S. 464, 472 (1953). Percy Green's behavior should not be required to be forgiven or forgotten by McDonnell unless Title VII was designed to abrogate widely respected concepts of civility and morality. In *Adler v. Board of Education*, 342 U.S. 485, 492 (1952), the Court, quoting with approval from *Garner v. Los Angeles Board*, 341 U.S. 716, 720 (1951), held that not even a public employer need blind itself to the trouble-making propensities of an employee:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.* Both are commonly inquired into in determining fitness for both high and low positions in private industries and are not less relevant in public employment."

Under the NLRA, it has consistently been held that an employer has the absolute right to discharge an employee who has participated in barring access to the employer's premises. *W. J. Ruscoe Co. v. N.L.R.B.*, 406 F. 2d 725 (6th Cir. 1969); *Victor Product Corporation v. N.L.R.B.*, 208 F. 2d 834 (D.C. Cir. 1953); *Oneita Knitting Mills v. N.L.R.B.*, 375 F. 2d 385 (4th Cir. 1967); *N.L.R.B. v. Indi-*

ana Desk Co., 149 F. 2d 987 (7th Cir. 1945); *N.L.R.B. v. Perfect Circle Co.*, 162 F. 2d 566 (7th Cir. 1947).

Both the NLRA and the Civil Rights Act condone only that type of demonstration or opposition which consists of lawful behavior. In *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), the Court upheld the right of an employer to fire employees who had participated in an illegal "sit-down" strike, stating at 252:

> "This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property."

The Board argued that the employer's previous unfair labor practices justified the employees' actions and required their reinstatement. Those contentions were rejected, the Court holding that no matter how reprehensible the employer's conduct, the employees must confine their retaliation to legal acts or avail themselves of their legal remedies or their right to strike, but they cannot expect judicial approbation of unlawful acts which infringe upon the rights of others:

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. . . . We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct. . . . The conduct thus protected is *lawful* conduct."

See also *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31 (1942); *National Packing Co. v. N.L.R.B.*, 352 F. 2d 482 (10th Cir. 1965); *Buttny v. Smiley*, 281 F. Supp.

280 (D. Colo. 1968); *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969) *cert. denied* 398 U.S. 965 (1970). The reasoning of these decisions is even more apt when applied to the operations of a major government defense contractor like McDonnell.

If Green had a legitimate quarrel with McDonnell's policies, the appropriate vehicle for ventilating his views was the legal process of the EEOC and the courts, not the illegal blocking of streets and sidewalks. He cannot interfere with McDonnell's operations and harass its employees and thereafter claim an exemption for his actions because of his color. The fact that no violence or personal or property damage occurred, thanks to efficient police work, does not excuse Green's behavior. *W. T. Rawleigh Co. v. N.L.R.B.*, 190 F. 2d 832 (7th Cir. 1951); *N.L.R.B. v. Indiana Desk Co., supra.*

For this Court to approve the rules and the reasoning of the Eighth Circuit would be to give the judicial imprimatur to conduct such as that of respondent, and would thwart the mandate of Title VII by authorizing the substitution of physical self-help for conciliation. The District Court was correct in ruling the stall-in and lock-in[16] to be justifiable disqualifying factors, whether

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[16] The concurring judge in the Court of Appeals thought it significant that Green did not personally chain the doors of the Roberts Building during the "lock-in." The evidence is clear, however, that he was in charge of the demonstration and had advance notice of the plan to chain the door, in which he acquiesced. Those who participate in illegal protest activities and who actively cooperate with offenders are equally to blame and must suffer the consequences. *W. J. Ruscoe Co. v. N.L.R.B., supra; N.L.R.B. v. Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953); *Oneita Knitting Mills, Inc. v. N.L.R.B., supra.* In any event, even if McDonnell had been mistaken as to Green's role in the lock-in, such a misconception would not have tarnished its perfectly valid employment decision based on the stall-in. The record is clear that the individuals who made the decision had been advised that Green was the leader of the lock-in demonstration (A. 404), and their good-faith reliance on this information—even if mistaken in fact—would not constitute a Title VII violation.

or not they would have affected Green's job performance. To hold otherwise would be to allow respondent to profit by his own wrongdoing.

II. In Civil Rights Cases Alleging Discrimination, the Employer Should Be Allowed to Offer Subjective Evidence as to His Motivation, and the Weight to Be Accorded to Such Evidence Should Be Determined by the Trier of Fact.

The majority opinion of the Court of Appeals held in effect that "subjective" criteria are entitled to little or no weight in a case of alleged job discrimination. It dismissed petitioner's evidence of respondent's illegal activities as unworthy of credence in the context of a refusal to hire, and characterized it, and employer evidence generally, as "pretextual." The effect of the opinion, as the dissenting judge interpreted it, is to instruct the trier of fact that no evidence which petitioner might offer that the stall-in or lock-in occasioned the refusal to hire should be given any consideration.

Although, for the reasons cited above in Point I.A., McDonnell submits that Green failed to make a *prima facie* case of discrimination, nevertheless McDonnell did not rest at the end of respondent's case and did not merely deny any wrongdoing, but came forward with an abundance of creditable evidence of its motivation and established valid non-discriminatory reasons for refusing employment to Green. But according to the Court of Appeals, petitioner's evidence is suspect and cannot support its defense. We submit that the Eighth Circuit's effective abolition of "subjective" evidence was based on an erroneous premise, and the adoption of such a rule by this Court would hamstring the judicial process in its quest for truth.

Even if we assume, *arguendo*, that respondent made a *prima facie* case under the Act, then at most "the burden

is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The search in a discrimination case is for the employer's "real motive" in an attempt to identify and rectify employment decisions prompted by racial or other forbidden prejudices. *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132 (1937); *Radio Officers v. N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937). Once a *prima facie* case of discrimination has been made out, the inquiry should then focus upon whether the employer's conduct was primarily motivated by racial animus and was thus unlawful. *N.L.R.B. v. Brown*, 380 U.S. 278, 288 (1965); *Radio Officers v. N.L.R.B., supra; Teamsters Local No. 357 v. N.L.R.B.*, 365 U.S. 667, 675 (1961). The unprecedented holding of Court of Appeals has severely hindered this investigatory process by its command that the employer's subjective explanation for his actions be disregarded.

A requisite of the orderly functioning of our legal system is the entrustment of the fact finding process to the jury or court, under proper standards, and the recognition of the fact finder's superior ability to appraise a witness' candor and to evaluate the testimony given by that witness in the light of his interest in the outcome of the lawsuit. Often the most critical and difficult inquiry which must be made by the fact finder is that of motivation, for in a wide variety of legal actions, the actor's intent or motivation is outcome-determinative. Nonetheless, in anti-trust,[17] tax,[18] and other civil cases,[19] as well as in crim-

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[17] *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

[18] *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *Rudolph v. United States*, 370 U.S. 269 (1962).

[19] *Bank v. Kennedy*, 17 Wall. 19 (1872).

inal proceedings,[20] this Court has consistently afforded the defendant the right to state his intent and has allowed the trier of fact to determine the trustworthiness of the witness and the weight to be given to his testimony. For example in *Wallace v. United States*, 162 U.S. 466, 477 (1896), the Court stated as follows:

> "It has often been decided that where the intent is a material question, the accused may testify on his own behalf as to what his intent was in doing the act."

Certainly if such a rule is appropriate in a criminal case, where the witness' very freedom is at stake and the risk of falsified testimony is thus maximized, there is no reason to foreclose an employer from explaining his state of mind in a Title VII case. No court had so held until the Eighth Circuit decision under review here. While the Court of Appeals' rule ostensibly referred only to the "weight" to be granted to subjective evidence, in operation it actually functions as one of admissibility, or, perhaps more accurately, as a substantive rather than an evidentiary rule. Even on the compelling facts of the instant case, McDonnell's clear showing of its motivation is, under our reading of the opinion of the Court of Appeals, to be given no weight whatsoever. As a practical matter, the evidence is relegated to the same status as if it had been declared totally inadmissible.[21]

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[20] *Wallace v. United States*, 162 U.S. 466 (1896); *Crawford v. United States*, 212 U.S. 183 (1909).

[21] To the extent, however, that we *are* in fact concerned with a question of weight rather than admissibility, the Eighth Circuit has disregarded the well-established doctrine that the task of weighing the evidence properly belongs to the district court. *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944); *Aetna Life Insurance Company v. Ward*, 140 U.S. 76 (1891).

The apparent thesis underlying the Court of Appeals' abolition of subjective evidence is a suspicion that men may lie when questioned about their motives. Such reasoning smacks of the old common law rule which rendered a party to an action incompetent to testify because of his interest in the outcome of the litigation. For years, however, modern courts have recognized the ability of the fact finder to weigh the interest of a witness in assessing his veracity. *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404 (1962).[22] This Court's opinions in the labor cases, see *N.L.R.B v. Great Dane Trailers, Inc, supra*, have specifically acknowledged that the person who makes the challenged employment decision is the best possible source of knowledge as to why it was made, and he should be allowed to state the reason. The safeguard of cross-examination, as well as the fact finder's opportunity to observe the witness' demeanor, provides ample protection against the possibility that perjured testimony might carry the day. In *Commissioner v. Duberstein*, 363 U.S. 278 (1960), the Court reaffirmed its adherence to the historically recognized role of the fact finder, in language befitting a Title VII case:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience of human conduct to the totality of the facts of each case. The non-technical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with the various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact."

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[22] If we repose such confidence in administrative agencies and lay jurors, certainly at least the same respect must be paid to federal district judges.

The "objective evidence" rule formulated by the Eighth Circuit was not advocated by any of the parties to this case but was conceived by the panel majority *sua sponte*, as were the burden-of-proof rule and the job-relatedness test. Cited in support of this prohibition of subjective evidence was a school-teacher displacement case decided by an appellate panel of which the authors of the majority and concurring opinions below were members, *Moore v. Board of Education of Chidester School District*, 448 F. 2d 709 (8th Cir. 1971). There it was held that where the number of available public teaching jobs is reduced by virtue of the implementation of a desegregation plan, teacher layoffs must be measured against objective criteria, such as amount of education, experience, and the like. Such rules have no relevance in a case where the judicial inquiry seeks only to determine the reasons why a particular job applicant was refused employment. Nor are such standards adaptable to applications for employment in private industry, where the circumstances are likely to be infinitely varied and where the statute authorizes rejection of a prospective employee for any reason other than a discriminatory one.

In *Fluker v. Alabama State Board of Education*, 441 F. 2d 201 (5th Cir. 1971), the court rejected the contention that a school board could justify its termination of a non-tenured teacher only by demonstrating "that he has failed to comply with some previously announced standard." The court acknowledged that such a principle would afford security for school teachers but found it wanting in law and deleterious to the school's right to upgrade its faculty and academic standing, stating, at 207:

> "Appellants' proposal of this requirement also ignores the highly subjective nature of employer-employee relationships. . . . We can see that . . . there are an enormous number of fact situations in

which the non-reappointment of an employee may be justified by highly subjective and perhaps unforseeable considerations."

Like the dissenting judge below, petitioner is at a loss to understand how an inquiry as to motivation can be undertaken on the basis of only "objective" evidence or, for that matter, to understand what "objective" evidence is in the context of the instant case. Would it require McDonnell to have a *written* policy of not hiring anyone who had intentionally disrupted traffic or locked its employees in a building? Did the Court of Appeals mean to say that a suspected embezzler or arsonist *could not be* rejected unless the employer can point to some objective standard covering the situation? Common sense confirms the existence of such policies but also demonstrates the needlessness of reducing them to writing and the futility of attempting to anticipate the almost infinite number of possible factual variations.

In summary, the District Court committed no error with regard to the admissibility or weight accorded to McDonnell's testimony as to its reasons for not hiring Green.

CONCLUSION

The record amply supports the determination of the experienced trial judge that McDonnell acted within its rights in refusing employment to Green. The District Court tried this case under proper standards and reached the right result. The Court of Appeals misconstrued the statute and this Court's opinion in *Griggs,* improperly assigned the burden of proof and erroneously restricted the evidence which could be considered in explanation of petitioner's actions.

Accordingly, the opinion and judgment of the United States Court of Appeals for the Eighth Circuit should be vacated and the cause remanded to that Court with instructions to enter an order affirming the judgment of the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

PERCY GREEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

and

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae* in the present case.[1] In support of this motion, the Chamber states as follows:

---

1. Pursuant to Rule 42(2) of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for respondent gave such consent. Counsel for the petitioner, however, declined to consent.

1. The Chamber is a federation with a membership of more than 3,700 state and local chambers of commerce and trade associations, and an underlying membership of more than five million businessmen and business firms. It is the largest association of business and professional organizations in the United States.

2. The basic issue involved in this case—the prohibitions imposed by Title VII of the Civil Rights Act of 1964 in a nondiscriminatory employment situation—is a matter of significant national concern. In *Griggs* v. *Duke Power Company*, 401 U. S. 424, 431 (1971), this Court held that Title VII necessitated "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." In the instant case, however, such Congressional intent has been seriously perverted. Title VII has been applied to an isolated refusal to hire which neither operates invidiously against those protected by the Act nor involves arbitrary or unnecessary job qualifications. The result is that, contrary to the objectives of Title VII, the Court of Appeals has required that the Company extend a discriminatory preference to certain groups; that it provide a black employee, as stated by the dissent, not merely with "the same opportunity as a white, but . . . one of a different and greater degree." App. to Pet., p. A37. This unprecedented interpretation of the law, the Chamber believes, will vitiate, rather than foster, the cause of eliminating employment discrimination.

3. The interest of the Chamber, accordingly, is based on the dangerous and far-reaching consequence that af-

firmance of the decision below will have for American industry. It is for this reason that the Chamber respectfully submits its views.[2]

Respectfully submitted,

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2. The Chamber submitted a brief, and participated in the oral argument, as an *amicus*, in *Griggs*. It also recently submitted *amicus* briefs in two important Title VII cases now pending before the Fifth Circuit *en banc: Huff* v. *N. D. Cass Company*, No. 71-2342, and *E. E. O. C.* v. *H. Kessler and Company*, No. 71-1082.

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This brief is filed on behalf of The Chamber of Commerce of the United States of America contingent upon the Court's granting the annexed motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber is set forth in the annexed motion for leave to file a brief *amicus curiae.*

ARGUMENT

I.

The Court Below Misinterpreted *Griggs* v. Duke Power Company, 401 U. S. 424 (1971).

The crux of *Griggs* is that when an employer disqualifies those persons protected by the Act at a substantially higher rate than other individuals, and his conduct has no significant relationship to the employment in question, such conduct then constitutes forbidden employment discrimination. In the instant case, however, neither of these two critical prerequisites of *Griggs* are present. Accordingly, as under analogous provisions of the National Labor Relations Act, 29 U. S. C. § 151, *et seq.*, management is free to effectuate any employment act it chooses; it may, for example, take personnel action "for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not [take such action] when the real motivating purpose is to do that which [the Act] forbids."[1]

A. As counsel for the petitioners in *Griggs* acknowledged, an employer's conduct may not be found discriminatory "merely because it disadvantages an individual black in some isolated situation. A practice should be found discriminatory only where it *consistently* and *systematically* prefers whites over blacks."[2] The personnel action must, in other words, operate as "a serious

1. See, e.g., *Ft. Smith Broadcasting Co.* v. *N. L. R. B.*, 341 F. 2d 874 (8th Cir. 1965); *N. L. R. B.* v. *McGahey*, 233 F. 2d 406, 412-413 (6th Cir. 1956); and *Tims* v. *Board of Education, et al.*, 452 F. 2d 551 (8th Cir. 1971).

2. Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1671 (1969) (Emphasis added).

barrier" to minority employment; if there is no such barrier, the case "need be subjected to little, if any, examination under fair employment laws."[3] Indeed, in a colloquy during the oral argument in *Griggs* between Mr. Chief Justice Burger and counsel for Griggs, counsel admitted that "the key to [his] case" was that the employment act there at issue "disproportionately screen[ed] out members of a particular race or national group." It was recognized that, if the *Griggs* hiring requirements had been applied in a situation where there was a virtual all-white population, there would have been no violation of the Act.[4] In sum, as *Griggs* itself teaches, the "consequences of [the] employment practices" in question must operate as "built-in headwinds" to the equal employment opportunities of minority groups. 401 U. S. at 432.

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3. Brief for the petitioner in *Griggs* at n. 18 and p. 30.

4. Transcript of oral argument in *Griggs* at pp. 15-17:

Q. [Mr. Chief Justice Burger] Well would it be a violation of the act if an employer had a general policy that he would not hire anyone, in any capacity if they didn't meet certain potential promotibility qualifications?

A. [Mr. Jack Greenberg for Petitioner Griggs] That would not be a violation of the job if he could demonstrate that that kind of a capacity is necessary to do the job. And necessary for the operation of his plant. It then might not be a violation either if it did not disproportionately screen out members of a protected race or national group or—

Q. Well now that's the key to—

A. That's the key.

Q. To your case, isn't it?

A. That's the key. • • •

Q. Then if a power plant in let us say the state of Maine on the assumption that there would be an almost all white population there, if a power plant in the state of Maine had a high school or other aptitude test that was directed at promotibility, and it did not have any adverse impact on any racial group or national origin group, it would not be—

A. That would be an industrial problem. I would suggest that they might be depriving themselves of people who could do the job very well, but that would not be the problem—

Q. No violation problem?

A. No violation problem. • • •

The decision below disregarded this essential *Griggs* prerequisite. There was no evidence introduced in this case to show that blacks as a class engaged in unlawful demonstrations against prospective employers in a greater proportion than any other racial group. Consequently, the Company's isolated act of disqualifying, regardless of his group identity, a particular applicant for employment who engaged in such activities had no inherently discriminatory impact upon the classes protected by the Act. This is a critical deficiency. Where, as, in the instant case, there is no "serious barrier" to minority employment, an employer cannot be denied the right to continue utilizing any employment standard he chooses, even though it may be based on "subjective" considerations.[5]

B. Apart from the absence of any serious racial barrier, the conduct here at issue was also clearly justified by legitimate business considerations. Certain conduct, it is submitted, is so inimical to the Act's purposes that employees should be deprived of the Act's protection regardless of any possible impact of the employer's conduct on affected groups. This fundamental principle of industrial jurisprudence is ingrained in decisions under the analogous provisions of the Labor Act. It is similarly applicable in the instant case.

In one of the first Labor Act cases, for example, this Court rejected the view that the statute protected those persons who sought through unprotected means to accomplish legitimate ends. As this Court stated in *N. L.*

5. As in analogous situations under the Labor Act, there is here no "inherently destructive" impact on a protected group but, rather, only a "comparatively slight" harm which requires an affirmative showing of improper motivation. Since petitioner's refusal to hire Green was concededly not so motivated, there was no unlawful discrimination. Cf., e.g., *N. L. R. B.* v. *Great Dane Trailers*, 388 U. S. 26 (1967); *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963); and *American Ship Building Co.* v. *N. L. R. B.*, 380 U. S. 300 (1965).

R. B. v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), the right of employees to protest employment conditions gives them no license to engage in "unlawful acts to force compliance with [their] demands." Employees are not insulated from disciplining merely because their conduct occurs in the context of a labor dispute or in response to their employer's unfair labor practices; to do so "would . . . put a premium on resort to force instead of legal remedies and . . . subvert the principles of law and order which lie at the foundations of society." *Id.* at 253. See, to the same effect, those decisions uniformly upholding the right of an employer to discharge or refuse employment to persons who either unlawfully interfere with the employer's property rights (e.g., *N. L. R. B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (4th Cir. 1944)), obstruct egress or ingress to the employer's premises (e.g., *N. L. R. B.* v. *Perfect Circle Co.*, 162 F. 2d 566 (7th Cir. 1947)) or otherwise engage in acts of misconduct which damage the business or reputation of the employer (e.g., *N. L. R. B.* v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503 (2nd Cir. 1942); and *Hoover Co.* v. *N. L. R. B.*, 191 F. 2d 380 (6th Cir. 1951)). The rationale of such decisions, as this Court has emphasized, is that to "require an employer finance . . . activities" which undermine "industrial plant discipline and loyalty" is fundamentally inconsistent with the national labor policy of "promoting industrial peace and stability." *N. L. R. B.* v. *Electrical Workers*, 346 U. S. 464, 476 (1953).[6] A similar criterion,

6. Thus, under the Labor Act, the initial inquiry in determing whether a violation has been committed is to ascertain whether the activities involved are "protected" by the Act. If "unprotected," there is no violation even if such activities are peaceful and lawful. See Cox, *The Right To Engage in Concerted Activities*, 26 Ind. L. J. 319 (1951). Even where found to be "protected," moreover, the activity may lose such protection where it is accompanied by serious, albeit lawful, acts of misconduct. See, e.g., *N. L. R. B.* v. *Electrical Workers*, 346 U. S. 464 (1953). Indeed, where an employee violates the Labor Act, dis-

it should be noted, is also well-established in industrial jurisprudence.[7]

This standard should likewise prevail under Title VII. That Act, like the Labor Act, also seeks the peaceful resolution of disputes. It is for this reason that persons offended by conduct alleged to be unlawful under Title VII are afforded a wide arsenal of legal weapons to redress their grievances.[8] They are also specifically guaranteed, under Sec. 704(a) of the Act, absolute protection against reprisals where they express, *by lawful means*, opposition to practices "made unlawful" under Title VII; a protection which even extends to the filing of false or baseless

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ciplinary action against him will be upheld even where the employee's conduct has been provoked by the employer's own severe unfair labor practices. See, e.g., *National Packing Co.* v. *N. L. R. B.*, 352 F. 2d 482, 485 (10th Cir. 1965).

7. The serious acts of misconduct committed by Green in the instant case, for example, would deprive him of employment rights even under "just cause" standard applied by arbitrators. See, e.g., *Kirkhill Rubber Company*, 65-2 ARB 8440 (production "slowdown"); *The Cooper Hospital*, 65-2 ARB 8703 (picket line misconduct); and *Harvey Aluminum, Inc.*, 66-2 ARB 8546 (strike misconduct). Such decisions represent, of course, an important "instrument of federal labor policy." *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970).

8. In addition to private suits, Title VII, as recently amended, also authorizes the E. E. O. C. to institute federal court actions on behalf of individuals or classes allegedly aggrieved and additionally permits, in appropriate cases, the entry of temporary injunctive relief pending final disposition of a case. Equal Employment Opportunity Act of 1974, Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1974), Sec. 706(e), and (f)(1) and (2). These expanded rights supplement existing relief available under the post Civil-War civil rights statutes (see, e.g., *Jones* v. *Mayer*, 392 U. S. 402, 409 (1968)), Attorney General "pattern and practice" actions (See Sec. 707(c) of 1972 Act) and other federal laws, executive orders, contractual provisions, and state fair employment statutes. See, e.g., *Truck Drivers and Helpers, Local 568* v. *NLRB*, 379 F. 2d 137 (D. C. Cir., 1967); *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Rios* v. *Reynolds Metal Co.*, ... F. 2d ....., 5 FEP Cases (5th Cir. 1972); and Executive Order 11246, 3 C. F. R. § 402 (1970).

charges with the Commission. *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir. 1969). The underlying purpose of the Act is thus "to protect the employee who utilizes the tool[s] provided by Congress to protect his rights." *Id.* at 1005. There was no intent, any more than under the Labor Act, to channel allegations of employment discrimination away from the established legal machinery into "stall-ins", "sit-ins" or similarly unprotected activities. The decision below, if affirmed by this Court, would, however, have precisely that result.

II.

The Decision Below Creates a Required Preference for Classes Covered by the Act.

Title VII does not "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs*, 401 U. S. at 431. Such a requirement would, as this Court recognized in *Griggs*, fly in the face of the Act's anti-preferential provisions forbidding an employer from showing "discriminatory preference for any group, minority or majority . . ." *Ibid.* The decision below, however, disregards this basic principle.

Under the Court of Appeals' view, an employer is required to have one rule for minority applicants—they may not be disqualified from employment for engaging in unlawful actions against their prospective employer—and a different one for non-minority persons who admittedly would not have been hired for engaging in similar conduct. Where, as in this case, there is no showing that such inconsistent treatment is required either to remove discriminatory employment barriers or to rectify past misconduct, such reverse discrimination cannot be justified. In Title VII, Congress sought only "to aid minority

employment within the constraints of color blindness and non-interference with employer decisions that are based on legitimate business considerations.'" It went no further, and expressly omitted from the Act any mandatory minority-aiding quota systems. It is precisely such a forbidden quota which, nonetheless, will result from the decision below.

The Chamber submits that, consistent with the purposes of the Act and *Griggs*, personnel action should be found discriminatory only where: (1) overt discriminatory intent is established; (2) the inherent effect of such conduct is discriminatory as, for example, the employment tests and educational job requisites involved in *Griggs;* or (3) the employer retaliates employment practice is used to retaliate against activities protected by the Act. In the present case, none of these three conditions have been met.

9. Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1166 (1971).

CONCLUSION

For the reasons stated herein, as well as those presented by the petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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v.

PERCY GREEN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

The original majority , concurring and dissenting opinions of the United States Court of Appeals for the Eighth Circuit filed on March 30, 1972, and the revised majority opinion and supplemental dissent filed on May 12, 1972, are reported at 463 F.2d 337, and are reprinted in Appendix A to the Petition for Writ of Certiorari, pp. A-1 through A-29 and Appendix B thereto, pp. A-31 through A-38.

The memorandum opinion of the United States District Court for the Eastern District of Missouri granting defendant's motion to strike that portion of the amended complaint which alleged denial of employment due to race, filed May 13, 1969, is reported at 299 F. Supp. 1100, and reprinted at A. 31-A. 36.[1]

The memorandum opinion of the District Court filed on September 25, 1970, dismissing plaintiff's action after trial and granting judgment to defendant, is reported at 318 F. Supp. 846, and reprinted in Appendix D to the Petition for Writ of Certiorari, pp. A-40 through A-49.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred, in including among the standards it enunciated for the guidance of the District Court on remand the admonition that "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."

2. Whether in the context of the instant case the Court of Appeals erred, in including among those standards, the statement that proof that an applicant for employment was qualified, that he was denied the job, and that the job remained open, presents a prima facie case of discrimination—followed immediately by the qualification that the applicant's past participation in unlawful conduct directed at the employer might indicate lack of a responsible attitude toward performing work for that employer, but that the applicant in turn could show

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[1]Unless otherwise indicated, references to "A. ___" will be to the Appendix prepared following granting of certiorari.

that the employer's reliance on such unlawful conduct was pretextual or otherwise show racially discriminatory hiring practices by the employer which affected its decision.

STATUTES INVOLVED

The following portions of Title VII of the Civil Rights Act of 1964, Public Law 88-352, 42 U.S.C. 2000e et seq.:

Section 703(a), 42 U.S.C. §2000e-2(a):

(a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 704(a), 42 U.S.C. §2000e-3(a):

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 706(g), 42 U.S.C. §2000e-5(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charge in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

Respondent Percy Green [hereinafter sometimes "Green" or "plaintiff"] is a black citizen of St. Louis, Petitioner McDonnell Douglas Corporation [hereinafter sometimes "McDonnell" or "defendant"] is a large

aircraft and aerospace manufacturer with corporate headquarters and production facilities in St. Louis, where it employs over 30,000 people.

ADMINISTRATIVE AND PRE-TRIAL PROCEEDINGS

On July 26, 1965, Green applied to McDonnell for a job as an electric mechanic, in response to McDonnell's newspaper advertisements of such openings for immediate employment. He had been employed by McDonnell for eight years (except for 21 months in the Army) (A. 52-79), had a good work record, and McDonnell has never questioned his qualifications for the job (A. 323, 359, 494-75). When McDonnell refused to employ him although many such positions were still open (A. 454, 492), Green filed a charge with the Equal Employment Opportunity Commission [hereinafter "EEOC"] on September 14, 1965, alleging: "Discrimination was practiced because of my race and because of my persistent involvement with the Civil Rights Movement." (Exh. A. to Complaint; Reprinted infra at 1a-3a). On May 8, 1967, EEOC found probable cause to believe McDonnell had violated Section 704(a) of the Civil Rights Act of 1964 [hereinafter "Title VII" of "the Act"] by refusing to accept Green for employment because of his involvement in civil rights activities. It made no finding with respect to Green's Section 703(a) ground for his charge, discrimination because of race. (Exh. C., Reprinted infra at 6a-10a). On March 19, 1968, EEOC notified Green that conciliation efforts had failed to achieve voluntary compliance with Title VII and that Green was authorized to institute a civil action in the appropriate district court within thirty days. (Exh. E to complaint, reprinted infra at 4a-5a).

On April 15, 1968, Green filed a complaint in the United States District Court for the Eastern District of Missouri, alleging employment discrimination against him in violation of Title VII because he had opposed unlawful employment practices and because of his involvement in civil rights activities. The complaint prayed for injunctive relief, an order requiring McDonnell to hire Green, back pay, attorney's fees and costs (A. 6). McDonnell's answer denied the material allegations of the complaint (A. 9).

Plaintiff's Interrogatories, Set No. 2, filed October 24, 1968, asked for monthly statistics concerning McDonnell's work force in the St. Louis area from January 1, 1961 to date, broken down by job classification and by race, as well as statistics as to transfers from one classification to another, the criteria for eligibility for transfer, lines of progression, seniority standards, requirements for initial employment, and statistics concerning the number of refusals to employ or transfer broken down as to race (A. 11). McDonnell filed objections to these Interrogatories on grounds of irrelevance and burdensomeness (A. 15), and the objection was sustained by the District Court on grounds of burdensomeness, on December 31, 1968 (A. 18).

Green then moved, on January 13, 1969, for an order to require McDonnell to produce and permit the inspection and copying or photographing of its records covering essentially the same matters (A. 18), pointing out that "plaintiff would have the burden of obtaining the information from the books and records of the defendant" (A. 19). McDonnell objected again (A. 22), incorporating by reference the assertions of irrelevance it had previously advanced in connection with the Interrogatories. These, in turn, had claimed that the pleadings raised issues only as to one man in one job on one day

while the information sought covered an eight-year period, transfers, promotions, and other jobs and applicants. The District Court on February 14, 1969 sustained most of the objections (A. 23), noting: "There is no allegation in the complaint that the reason plaintiff was not employed was because he was a Negro," and adding, with reference to the statistical breakdown of McDonnell's work force, by race and by job classification, "All of these matters requested by the plaintiff showing employment and the pattern of employment are completely unrelated to the suit in question and are not calculated to the discovery of any admissible evidence. . . . (A. 24). The court ordered production only of documents showing the requirements for initial employment and data as to the use of tests and interviews, but limited to the month of July 1965.

On March 20, 1969, Green filed an Amended Complaint, which added allegations that he had been denied employment because of his race and color (A. 25). The next day, McDonnell moved to strike these additional allegations, and the motion to strike was granted by the District Court of May 13, 1969 (A. 30). The court's Memorandum Opinion (299 F. Supp. 1100; A. 31) construed the Act to require an affirmative finding of reasonable cause by EEOC as a jurisdictional prerequisite to a civil action, and held that the lack of such a finding as to racial discrimination as distinguished from discrimination for civil rights activities therefore prevents Green from including in his action any claim of employment discrimination based on race.[2] Plaintiff's motion for a

[2]Decisions of the Courts of Appeals have unanimously rejected the rule followed by the district court here. E.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Beverly v. Lone Star Lead Construction*, 437 F.2d 1136 (5th Cir. 1971); *Flowers v.*

certification pursuant to 28 U.S.C. §1292(b) to permit an appeal of an interlocutory order was denied, and an attempt to appeal without such a certification was dismissed by the Eighth Circuit for lack of jurisdiction on June 26, 1969.

THE TRIAL

The trial was held on January 12-15, 1970. Almost all of the testimony was concerned with Green's individual employment experience with McDonnell, his civil rights activities, his lay-off in 1964 and his qualifications as compared with those of white employees in the same category who were not laid off, and McDonnell's refusal to re-employ him in 1965.

There was testimony on both sides concerning the presence or absence of racial motivation for McDonnell's refusals to transfer or promote Green and for his lay-off. This must be regarded, however, as having been directed primarily to the issue raised by the pleadings–the credibility of McDonnell's assertion that its refusal to rehire Green was based on illegal activities on his part in protesting McDonnell's employment practices rather than on retaliation for his having "opposed any practice made an unlawful employment practice by this title." (Section 704(a) of the Act). This may be seen not only from the characterization of the action by the court, in its prior orders limiting discovery, as based only on retaliation for protected civil rights activities, but also in the confinement of proof on both sides almost exclusively to matters involving Green individually, as distinguished from the

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Local No. 6, Laborers International Union of North America, 431 F.2d 205 (7th Cir. 1970); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970).

general employment practices of McDonnell and the racial composition of its work-force which would have been highly relevant to an issue of racial discrimination.[3] Moreover, such evidence as to the percentage of blacks in McDonnell's employ, broken down into levels of responsibility, had not been available to Green's counsel for purposes of trial preparation. Part of this evidence was produced at the trial by Peter Robertson, an EEOC official, rather than by McDonnell (A. 136-137), and part only after the trial was concluded (A. 267).

The record strongly suggests that Green was subjected to racial discrimination while employed by McDonnell when he attempted to transfer to a research department. When he first requested transfer, he was told by Mr. Edward Sinecki, a supervisor, that the transfer might

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[3]Courts of appeals have repeatedly held, without exception, that statistics as to the racial composition of an employer's work force, both in total numbers and as allocated among positions of differing levels of responsibility, are highly relevant evidence of discrimination, may in appropriate cases give rise to presumptive proof of discrimination, and are relevant to the question of the motivation behind employment action taken in individual cases. Cf. *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972, cert. denied, ___ U.S. ___, 93 S.Ct. 319 (1972); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); *United States v. Hayes International Corp.*, 415 F.2d 1038, 1041, 1043-44 (5th Cir. 1969); *United States v. IBEW, Local 18*, 428 F.2d 144, 151 (6th Cir. 1970, cert. denied, 400 U.S. 943 (1970); *Marquez v. Omaha District Sales Office, Ford Division*, 440 F.2d 1157, 1160-61 (8th Cir. 1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426, 428 (8th Cir. 1970); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); cf. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962, affirmed, 371 U.S. 37 (1962): "In the problem of racial discrimination, statistics often tell much, and courts listen."

result in Green's termination (A. 60) and he was discouraged from transferring into the department. After Green was discouraged, Leo Jeffress, a white man, transferred and later gained promotion to Laboratory Technician A (A. 68, Pl. Exh. 33, A. 578).

Later Green was the victim of racial discrimination when he was finally permitted to transfer to the research department in July, 1963. He was the only black man among 100 white technicians (A. 69). At the time of the transfer he was not taken on a tour of the department, although it was a practice of McDonnell to take all potential new employees on this tour (A. 65). Nor was he given a training period, although it was a practice to give all new employees this training (A. 69).

Green was further victimized by racial discrimination when he, the only black in the department, was laid off in August 1964.[4] Supervisors Godefroid and Sinecki ranked all the employees of the department according to ability, potential, performance and cooperation, etc. (A. 144, 289). This ranking was known as a "totem pole" (Pl. Exh. 33, Tab 17, A. 570). In the ranking process, engineers who had an opportunity to evaluate the work of the employees were given an opportunity to express their opinions as to the employees position on the totem pole. Mr. Moahlenkamp, an engineer, expressed his opinion that one Richardson, a white man, did not deserve a ranking above Green (A. 159, 383). Peter Robertson,

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[4]The claim of racial discrimination in Green's lay-off was dismissed as being barred by the statute of limitations; and respondent did not cross appeal on this issue. However, evidence of discrimination in connection with the lay-off is never-the-less relevant to the credibility of testimony with respect to McDonnell's motives in refusing to rehire Green.

executive director of the Missouri Commission on Human Rights in 1964 testified that on August 17, 1964, a decision was made to lay-off and that a line was drawn over Green's name on the totem pole by Vice President Krone (A. 141), making Green the highest ranked laboratory technician B subject to lay-off (A. 374) (Pl. Exh. 33, Tab 17, A. 570). Thereafter, on August 28, 1964 Green was laid-off. Fourteen people below Green on the totem pole were retained, eleven who were never scheduled for lay-off and three who were scheduled for lay-off but transferred (A. 167). Before the lay-off, Green was approached for the purpose of determining whether he would accept a transfer to Cape Kennedy. He expressed interest in the transfer, but was advised by a Mr. Hammond that he shouldn't accept the appointment because of the racial climate in Florida (A. 153, 311). At the time of the lay-off, none of the employees working at Cape Kennedy were considered surplus employees subject to lay-off (A. 313, Pl. Exh. 33, Tab 20, A. 578).

Green was offered an optional test to transfer to another department within the company at the time of lay-off; but he declined to take the test unless those who were slated to be retained would take the same test. Green stated that if his score was not better than 3/4 of the people the company planned to retain, he would be willing to be laid off. McDonnell rejected Green's suggestion that all employees be tested (A. 72, 75). Two people below him on the totem pole failed the examination and were retained by McDonnell and transferred within the company (A. 573). One was a Mr. Graville who ranked 20 positions below Green. A Mr. Rauscher, who was 19 positions below Green, was not asked to take the examination and was nevertheless retained in the department.

There was also uncontradicted testimony that Green had participated in a "stall-in" of automobiles at a distance of one quarter mile to two miles from petitioner's plant that blocked access roads to the plant for about ten minutes for the purpose of dramatizing McDonnell's employment discrimination, and that he had pleaded guilty to a misdemeanor of obstructing traffic and had been fined $50. (A. 114 et seq.) It was also uncontradicted that Green had participated in the picketing of an office building in St. Louis where some McDonnell employees worked, to dramatize a protest against McDonnell's employment practices, on July 2, 1965, the effective date of Title VII, and that in the course of that demonstration the front door of the building had been chained; it was not shown, however, that Green had known about or participated in the plan to chain the building (A. 132-33).

Green had been an active civil rights leader, and was particularly concerned with employment discrimination in the St. Louis area, both by McDonnell and by other employers (A. 69-72, 79-84, 92-94). Other protest activities engaged in by him included the filing of charges of employment discrimination against McDonnell with various federal and state agencies, and the peaceful picketing of a road leading to the home of McDonnell's board chairman (A. 79-84). None of his activities while employed caused him to be absent or affected his performance on the job (A. 380). There was testimony by McDonnell officials that the refusal to rehire him was based on the "stall-in" and the "lock-in", but this was contradicted by other McDonnell officials who included the picketing near the Chairman's home[5] among the

[5] There was no violence, damage to property, or interference with traffic (A. 81, 154). The picketing was clearly a constitutionally protected form of communication of opinion concerning

reasons for rejecting him (A. 163, 434, 492), and by Charles L. Windsor, McDonnell's Personnel Manager, who said that he had 15 or 20 reasons for refusing to rehire Green, although he refused to enumerate them (A. 237-38, 411-12, 433-34).

If Green had been given timely access to statistics showing the small percentage of McDonnell's employees that were black, and the concentration of most of them in menial jobs (Pl. Exh. 33, A. 578), he would have had the opportunity of demonstrating the relationship of these patterns to the credibility of McDonnell's asserted reasons for refusing to rehire him.

On September 25, 1970, the District Court granted judgment to the defendant, and dismissed plaintiff's complaint with prejudice (A. 45). In its Memorandum Opinion, the court for the first time specifically treated the issue of racial discrimination as in the case stating:

> The testimony and evidence before the court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activities. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall in" and the "lock in" demonstrations. The burden of proving other reasons was on the plaintiff. (318 F. Supp. at 850).

The District Court also rejected a claim, raised in plaintiff's post-trial brief, that Green's lay-off in 1964 (before the effective date of Title VII) violated the Civil Rights Act of 1866, 42 U.S.C. §1981.

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an issue of public concern—the employment practices of a major employer and government contractor.

It summarized its conclusions as follows:

(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.

(b) Plaintiff's layoff claim under 42 U.S.C. §1981 is barred by the statute of limitations.

(c) The Civil Rights Act does not protect activity which blocks entrance into or from and employer's plant or office.

(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire. (318 F. Supp. at 851)

THE APPEAL

Green filed a timely appeal with the Court of Appeals for the Eighth Circuit, raising the following contentions:

(1) The trial court erred in dismissing his claim under 42 U.S.C. §1981 for relief from his allegedly unlawful lay-off.

(2) The trial court erred in determining that his participation in the "lock-in" and "stall-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a).

(3) The trial court erred in striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race. (463 F.2d at 340).

These issues were disposed of by the Court of Appeals as follows: The Court unanimously affirmed the ruling that any claim based on the 1964 lay-off was barred by the statute of limitations. 463 F.2d at 340-41. Since Green has not cross-petitioned, this issue is not before this Court.

The Court also unanimously affirmed the ruling that the "stall-in" was not protected activity within the coverage of Section 704(a) of the Act, 42 U.S.C. §2000e-3(a). 463 F.2d at 341.[6] Again, Green has not cross-petitioned, and this issue is out of the case.

The Court also unanimously held that the District Court erred in striking Green's allegations of racial discrimination from the complaint and in holding that an EEOC finding of reasonable cause as to Green's charge of discrimination because of race was a jurisdictional prerequisite to inclusion of that charge in an action under Title VII. The petitioner has not challenged this determination of error in its Petition for Certiorari or its Brief (cf. "Questions Presented", Petition p. 2; Petitioner's Brief, p. 2) and has apparently conceded the point (cf. Petitioner's Brief, p. 11).

The majority of the Court held that this error was prejudicial, and that Green was entitled to a new trial on the question of whether he was refused employment because of race. The opinion of the court stated:

> We cannot accept McDonnell's suggestion that it should prevail on an issue that Green was not privileged to present. We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case, notwithstanding the commend-

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[6]Two of the three judges of the panel, however, while treating the "lock-in" as also unprotected activity, deemed the charge that Green had some responsibility for the chaining of the door to have been unsupported, and hence a possible basis for concluding that the reasons advanced by McDonnell for refusing to hire Green may have been pretextual. 463 F.2d at 344, n. 6; 463 F.2d at 345; cf. 463 F.2d at 346-48.

able zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell. (463 F.2d at 342)

The point was developed in greater detail in Judge Lay's concurring opinion (463 F.2d at 344-45):

> The court's order refusing plaintiff leave to amend his complaint and utilize discovery on the issue of racial discrimination because the E.E.O.C. had not based its finding of probable cause on this ground is conceded error. Argument is made that nevertheless the issue was tried by consent and that the trial judge found there was insufficient evidence to support plaintiff's claim. The ancient Hebrew expression, "They tie our hands and then reproach us that we do not use them", gives sufficient response here.
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> Trial counsel who is foreclosed from pleading and pursuing discovery of facts relating to a particular legal theory is scarcely prepared to try the case on that theory. It is not realistic to urge that thereafter where facts pertaining to that theory are drawn into the case, the issue has been tried by consent and the party has no cause for complaint. If the adversary system means anything at all it is that lawsuits and issues are not designed to be tried by happenchance. To make inquiry as to what additional facts could have been shown is remote to the practicalities of the trial of any lawsuit. Preparation is the guts and heart of effective representation in any litigation. The very contemplation of trying a specific legal issue can trigger mental processes as to strategy in building documentary and testimonial proof of the case. The order of proof, as well as the direct and cross-examination, may well vary as the strategy to

present the issues as planned. Without adequate preparation by interviewing the witnesses, by discovery of facts unknown, by collation of the facts, by marshalling the documentary evidence, by investigating the law as to the particular issue to be tried, it is little wonder that a trial court dismisses a suit for insufficient evidence. Here, the trial court passed on a claim that it earlier foreclosed from being raised in the pleadings and on which it had refused discovery. For the above stated reasons that finding must be reversed.

Judge Johnsen, in dissent, expressed the view that the error was harmless, but issue of "harmless error" has not been raised by petitioner, whose "Questions Presented" in both its petition and brief on the merits make no reference to it, nor can it possibly be deemed a subsidiary question fairly comprised therein" [U.S. Sup. Ct. Rule 40, para. 1(d)(1)]. Moreover, there was no reference to any contention of harmless error in any part of the Petition for Certiorari and only a terse allusion in the "Statement of the Case" portion (pp. 11-12),[7] but not in

[7]There is no basis for Petitioner's statement (p. 11 of its brief on the merits) that "the parties actually tried the issue of racial discrimination by consent." There was no such consent, express or implied, and Green was obliged by the District Court's confinement of the case to the issue of retaliation to adopt a strategy of bringing in evidence of racial discrimination only tangentially, in the hope of impeaching McDonnell's claim that unlawful, rather than lawful, actions by Green protesting its employment policies motivated its refusal to hire him. Moreover, as pointed out in both the majority and concurring opinions of the Court of Appeals, the refusal of the District Court to permit Green to obtain discovery of evidence concerning McDonnell's employment practices and their racial consequences made adequate preparation for the trial of this issue impossible. 463 F.2d at 342, 345. And the statement in Petitioner's brief (p. 12, n. 6) that McDonnell supplied Green "with all of the relevant material sought to be discovered by the

the Argument, of its brief on the merits. Hence, if there were any issue of "harmless error", it would not be before this Court. U.S. Sup. Ct. Rule 40, para. 1(d)(2); Stern & Gressman, Supreme Court Practice 298 (4th ed. 1969). We shall therefore not brief it unless requested to do so by the Court.

Thus, only those portions of the Court of Appeals opinion that sought to guide the District Court upon the remand of the case are properly before this Court. Before detailing them, it is essential that we remind the Court that the majority opinion was modified substantially in response to McDonnel's petition for rehearing, that those portions of the original opinion that were withdrawn are nullified for all purposes, and that only the modified opinion is here for review.[8]

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motion for production and the interrogatories" is accurate only if "relevant" is read to mean "relevant to the issue of retaliation," and only if it is recognized that key material was produced only at or even after the trial. The transcript references cited by Petitioner (A. 232-33, 267) show that defense counsel, in asking that a trial subpoena be quashed, claimed that only records as to Green were pertinent, and plaintiff's counsel agreed to the quashing of the subpoena if certain statistical information relating to the period closest to the refusal to hire Green (A. 265) were produced within a week *after* the close of the trial.

[8]The original opinion of the Court of Appeals was filed March 30, 1972. In response to a petition by McDonnell for a rehearing, on May 12, 1972, Judge Bright modified his opinion of the court by striking and replacing a portion thereof, Judge Lay joined in the revised opinion and adhered to his prior separate concurring opinion, and Judge Johnson filed a supplemental dissenting opinion (A. 48). A petition for rehearing en banc was denied on June 28, 1972, by an equally divided court, and treating it also as a renewed petition for rehearing to the original panel, it was denied by that panel, Judge Johnsen dissenting (A. 50-51).

The final, modified, majority opinion of the Court of Appeals does not appear anywhere in consecutive, uninterrupted format. In the Federal Reporter it has to be pieced together out of 463 F.2d pages 338 to 343 (near bottom of first column), plus page 352 (near bottom of first column) to 353 (end of first column). Perhaps as a consequence, major parts of Petitioner's argument are addressed to statements that have been excised from the opinion. For the convenience of the Court, we are therefore printing at the end of this brief the full text of the majority opinion in its final form.

In several important respects, the petitioner attacks purported "holdings" by the Court of Appeals which are in reality *not* to be found in the court's modified opinion.

1. In remanding, the Court of Appeals made clear that both "parties should be permitted to present such additional evidence as may be relevant to the [racial discrimination] issue." (463 F.2d at 343). Nowhere did it forbid, or even cast aspersions on subjective evidence to prove motivation; Petitioner's Question Presented No. 2, and the large portions of its brief devoted to the question of the value of subjective evidence (pp. 17, 18, 34-39) are totally irrelevant.

The court addressed itself to subjective *criteria* for employment, not subjective *evidence* of motivation. It said (463 F.2d at 352):

> "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. . . . In Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be

limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. . . . Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. . . . "

2. The revised opinion of the Court of Appeals (463 F.2d at 353) did not, as contended by petitioner (Brief pp. 17, 20-21), ordain any shift in the burden of proof. It said:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.
>
> Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in", as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision. [Footnote omitted].

The earlier, superseded, opinion had included, after "we think he presents a prima facie case of racial discrimination," the clause "and the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job." (463 F.2d at 344). But

even if "burden" is construed as meaning "burden of proof", as distinguished from "burden of coming forward with evidence," this comment is completely out of the case. Indeed, its deletion can be interpreted only as a clear expression of intention by the Court of Appeals *not* to hold that there is any shift of burden.

Moreover, the reference to "prima facie case of discrimination" is followed immediately by an invitation to both parties to introduce further evidence–McDonnell to show that Green's unlawful conduct might indicate a lack of a responsible attitute toward performing work for it, and Green to show that his unlawful conduct was a pretext on the part of McDonnell for refusing to hire him or that there were other racially discriminatory hiring practices which affected its decision. Clearly, what the court was inviting was further evidence from both sides of the movitation behind the refusal to hire Green, without reference to any hint of a shift in the burden of persuasion.[9]

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[9]Neither can it be maintained that the reference to a "prima facie case of racial discrimination" connotes a shift in burden of proof. "Prima facie case" is an ambiguous phrase, which may mean either (a) that a plaintiff establishing it will prevail unless the defendant introduces a sufficient quantum of rebutting evidence, or (b) that there is merely sufficient evidence to prevent a directed verdict for the defendant or an involuntary dismissal at the close of plaintiff's case but giving the plaintiff no assurance that he will prevail. See 9 Wigmore on Evidence, §2494 (3d ed. 1940). In the context in which it was used in this case, with the deletion of the reference to the burden passing, and the clear contemplation of further evidence on the issue by both parties, there can be no basis for the contention that the court intended a shift in burden of proof.

3. Neither is there any basis for the petitioner's interpretation (Brief, pp. 19-24) of the reference to "a black man" as suggesting that a different standard is to be applied to blacks than to whites. The reference is obviously made in the context of a specific case in which a black man claimed he was discriminated against because he was black. In the less likely, but possible, case of a claim by a white man that he was discriminated against because he was white, the same principle would apply—that if he proved that he possessed the qualifications for the job, and was denied the job, and the job continued to remain open, he would present a prima facie case of racial discrimination against him. If he had participated in an unlawful demonstration, the employer could show that that, rather than discrimination against whites, had motivated the refusal to hire him, and the plaintiff in turn could show that the asserted reason was a mere pretext or otherwise show that hiring practices discriminatory against whites had affected the employer's decision. And the same principles would apply if the claim of discrimination were based on religion, national origin, or sex.

In short, the guidelines enunciated by the court reflect the practical problems faced by a plaintiff in trying to prove a discriminatory motivation almost never openly admitted, and to protect such a plaintiff from automatic dismissal at the close of his case when he has presented evidence from which a reasonable inference of discrimination can be drawn.

SUMMARY OF ARGUMENT

1. The Court of Appeals neither precluded, nor cast aspersions on the weight of, subjective evidence by McDonnell to explain or justify its actions. Petitioners have completely misread the opinion, which declares that

subjective *criteria* for employment decisions "may mask aspects of prohibited prejudice", and that therefore "judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment" to the removal of racial barriers to employment mandated by Congress.

The question of subjective evidence is not in this case. The totally unrelated question of subjective criteria for employment decisions is in the case, but has not been raised by Petitioner. Moreover, the statements of the Court of Appeals on this subject were merely dictum, or at most enunciation of the reasoning underlying the court's holding. They therefore do not seem to be appropriate for review here.

If, however, the question of the propriety of these statements of the Court of Appeals is properly here for review, they are in accord with authority in other circuits (*Rowe v. General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), *cert. denied*, ___ U.S. ___, 93 S.Ct. 319 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971)), and reflect the realistic judgment that if courts do not view subjective employment decisions with some skepticism racial discrimination can flourish undetected and unredressed.

2. Contrary to Petitioner's asserted apprehensions, the Court of Appeals did not shift the burden of proof from plaintiff to defendant; such language in its earlier opinion as might have been so regarded was carefully excised from its revised majority opinion. The court's statement that proof that Green was qualified for the job, that he was refused employment, and that McDonnell continued to try to fill the job, constituted *prima facie*

evidence of racial discrimination must be read, in context, as meaning only that such proof by Green would be sufficient to safeguard him from having his case dismissed when he rested. The court recognized that in many employment discrimination cases, the plaintiff might be able to prove little more than this, since outright admission by employer that they have been discriminating is rarely encountered.

The court made clear that it contemplated further evidence by both sides–bulwarking by McDonnell of its assertion that Green's unlawful activities were its reason for refusing to hire him, and rebuttal by Green to show that the "stall-in" was a mere pretext for a decision actually based on racial prejudice.

Similarly, the revised majority opinion did not require McDonnell to show that the "stall-in" was job-related in order for McDonnell to be permitted to prevail on the issue of whether it–rather than racial discrimination–motivated McDonnell's refusal to rehire Green. The Court of Appeals had no occasion to reach that issue in this case, and neither squarely relied on nor had to squarely rely on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

3. There is nothing in the decision or opinion of the Court of Appeals that suggests a double standard, whereby blacks would be accorded any preference either in employment decisions or in the conduct of Title VII litigation. The court's statement, that in some circumstances "a black man" may present a *prima facie* case of racial discrimination, must be viewed in the context of the instant case itself, in which the plaintiff was a black man. And the court's choice of language may also reflect the fact that in our society racial discrimination against black men is encountered thousands of times more

frequently than racial discrimination against white men, so that one writing about racial discrimination will almost automatically and unconsciously express himself in terms of discrimination against blacks. But the principle enunciated would apply equally in any case in which unlawful discrimination was claimed, and if a white man claimed he had been discriminated against because of his race, he could make a *prima facie* case in the same manner.

Petitioner has wrenched three words, "a black man" completely out of context, apparently to catch the attention of this Court and to give the impression that this case raises the throny issue of preferential treatment for blacks. There is no justification for such a misinterpretation of the decision of the court below.

4. Although respondent had only limited opportunity to conduct discovery; the record contains evidence which would justify this Court's affirmance of the decision below on the alternative ground that one presents a *prima facie* case of racial discrimination in employment by showing a history of prior racial discrimination coupled with proof that a qualified black man was denied a job and the position remained open.

ARGUMENT

I.

THE COMMENT OF THE COURT OF APPEALS, THAT "IN CASES PRESENTING QUESTIONS OF DISCRIMINATORY HIRING PRACTICES, EMPLOYMENT DECISIONS BASED ON SUBJECTIVE, RATHER THAN OBJECTIVE, CRITERIA CARRY LITTLE WEIGHT IN REBUTTING CHARGES OF DISCRIMINATION," WAS PROPER.

Petitioner has mis-read the opinion of the Court of Appeals, and has argued that it precludes, or treats as of little or no value, subjective evidence that McDonnell may offer at the new trial as to its motives in refusing to rehire Green. As pointed out above, the court was not referring to subjective evidence, but was merely restating the obvious fact that allowing employment decisions to be made on a purely subjective basis, without objective guidelines, may easily serve as a mask for, or afford ready opportunities for, covert discrimination.

We turn then to what the court below said, rather than what the petitioner misunderstood it as having said. It is not clear that any issue as to the propriety of the comment of the Court of Appeals on subjective criteria is even before this Court, (a) because the point was not raised as such by the petitioner, and (b) because it is little more than dictum or subsidiary reasoning, since it does not purport to be dispositive of any specific matter to be decided by the District Court on remand.

Nevertheless, if this remark of the Court of Appeals is deemed appropriate for review here, it should be noted that, far from an innovation, it is in accord with prevailing doctrine in Title VII cases in other circuits, and in conflict with none.

For example, in *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972), procedures that left most of the power of decision as to promotions and transfers to the subjective judgment of foremen were held to be susceptible of abuse:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action. See, Hawkins v. North Carolina Dental Society, 4 Cir. 1966, 355 F.2d 718, 723-24; Cypress v. Newport News General and Nonsectarian Hosp. Assn., 4th Cir., 1967, 375 F.2d 648, 655; Meredith v. Fair, 5th Cir., 1962, 298 F.2d 696, 702, cert. denied, 1962, 371 U.S. 828 . . . (457 F.2d at 359).

What the Court of Appeals for the Fifth Circuit said with respect to promotion and transfer is of course equally applicable to hiring.

In *Brown v. Gaston County Dyeing Maching Co.*, 457 F.2d 1377 (4th Cir., 1972), *cert. denied*, ____ U.S. ____, 93 S.Ct. 319 (1972), the court said (at 1382):

> In United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2nd Cir. 1971), the court identified the lack of "fixed or reasonably objective standards and procedures for hiring" as a discriminatory practice. Gaston's employment policies suffer the same deficiency. The company lacks objective guidelines for hiring, for pay increases within job classifications, and for promotion or transfer from one job to another.

Accord: *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971); *Baxter v. Savannah Sugar Refining Corp.*, 5 EPD ¶8009, at p. 6710 (S.D. Ga. 1972); see also as the analogous earlier Eighth Circuit case cited by the court below, *Moore v. Board of Education of Chidester School District*, 448 F.2d 709 (8th Cir. 1971). See also Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1677 (1969):

> Courts traditionally have been willing to review subjective selection procedures for indications of discrimination, examining statistics and the objective qualifications of accepted whites and rejected blacks.

And see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1117-18 (1971).

Thus, the comments of the court below were in accord with those of other circuits, and serve to close a loophole which if left open could utterly defeat the Congressional purpose of eradicating racial discrimination in employment. One such loophole was stopped by this Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), by barring the use of racially neutral "objective" testing requirements not related to job performance but which disproportionately barred blacks from employment. But the court was not suggesting that subjective judgments were thereby made sacrosanct. It said specifically: "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." (401 U.S. at 436). The court below, along with other courts throughout the country, have endeavored to close

or at least narrow the loophole of permitting reliance upon subjective criteria to perpetuate racial discrimination without redress.

II.

THE COMMENTS OF THE COURT OF APPEALS PROPERLY SET FORTH THE ISSUES AS TO WHICH BOTH PARTIES MIGHT INTRODUCE EVIDENCE AT THE NEW TRIAL.

As shown above (pp. 11a-24a), the modified majority opinion of the Court of Appeals bears no relationship to the issues discussed in Petitioner's argument. The court did *not* prescribe a shift in the burden of proof from plaintiff to defendant. And it did *not* require preferential treatment, in employment or in employment or in Title VII litigation, for blacks. It is important, therefore, to review what the court did say.

First of all, the court had to correct an apparent belief of the District Court that, that if an employee engaged in conduct not protected under the prohibition against retaliation in Section 704(a), 42 U.S.C. §2000e(3)(a), he was thereby barred from introducing any evidence that racial discrimination motivated the refusal to hire him, in violation of Section 703(a), 42 U.S.C. §2000e(2)(a):

> We think it is clear that an applicant for employment may be entitled to the protection of §2000e-2(a)(1) even though he participates in activities which fall outside the protection of §2000e-3(a). These statutes apply to wholly different facets of the employment relationship. Section 2000e-3(a) serves peripherally in the scheme of Title VII to shield an employee or applicant from employer retaliation. Section 2000e-2(a)(1) expresses Title VII's primary promise—equal employ-

ment opportunities for all. It would be antithetical to the remedial purposes of the Act to interrelate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside §2000-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by §2000e-2(a)(1).

(463 F.2d at 343).

The court went on to say "[o]n remand, the *parties* should be permitted to present such additional evidence as shall be relevant to the issue." (Emphasis supplied).

Next followed the revised Part V of the majority opinion, 463 F.2d 352 *et seq.* After pointing out the shortcomings of subjective employment criteria, discussed above, the court noted that employers seldom admit racial discrimination, that applicants must often rest their cases on proof of qualification for the job denied them,[10] that there was no dispute that Green had these qualifications and that after McDonnell refused to hire him it continued to seek applicants for the job it had denied him.

In the light of this background, the court stated that this would prove a *prima facie* case of racial discrimination, but added that McDonnell could show that Green's participation in unlawful conduct directed at McDonnell might indicate his lack of a responsible attitude toward

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[10]Other courts have recognized that "the importance of choosing the ... more difficult method of proof–*i.e.*, presenting specific evidence of blacks' qualifications for jobs denied them–cannot be overstressed. *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 447 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); see also *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397 (D. Ore. 1970).

performing work for McDonnell. The court imposed no limitation on the type of evidence McDonnell might offer in order to show this, and certainly no limitation on or disparagement of subjective evidence if that is what McDonnell chooses to employ.

Finally, the court said that Green in turn should be permitted to show that the reasons advanced by McDonnell for refusing to hire him were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected the decision.[11] It

[11] The Court of Appeals may have been moved to make this point because of admissions by key officials of McDonnell that their refusal to rehire Green was motivated by factors other than the "stall-in" or the "lock-in", including the peaceful picketing of a road leading to the home of the Chairman of the Board of McDonnel and a number of other reasons, not specified. (A. 163, 237, 411-12, 433-34, 492). Title VII has been consistently construed as barring employment decisions based on a combination of reasons some of which are proper and some forbidden. *King v. Laborers International Union of North America, Union Local No. 818*, 443 F.2d 273 (6th Cir. 1971); EEOC Decision No. 70-925, 1 CCH Employment Practices Guide §6158 (June 22, 1970); EEOC Decision No. 71-1902, 1 CCH Employment Practices Guide ¶6281, at p. 4498 (April 28, 1971); EEOC Decision No. 72-0264, 1 CCH Employment Practices Guide ¶6292, at p. 4520, n. 3 (August 6, 1971); *cf. Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970) (housing discrimination); *Budd Manufacturing Co. v. NLRB*, 138 F.2d 86, 90-91 (3d Cir. 1943), *cert. denied*, 321 U.S. 778 (1944); *NLRB v. Barberton Plastic Products, Inc.* 354 F.2d 66, 68 (6th Cir. 1965); *NLRB v. Historic Smithville Inn*, 414 F.2d 1358, 1361 (3d Cir. 1969) (National Labor Relations Act).

The decisions of the Equal Employment Opportunity Commission cited above constitute administrative interpretations of Title VII by the agency charged with enforcing it, and are "entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965).

It should also be noted that the House or Representatives rejected the "Dowdy Amendment" to Title VII, that would have

stated in conclusion that since the District Court had not used appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated, "[o]n remand, *both parties* will have the opportunity to present evidence on this matter." (Emphasis supplied).

Viewed in context, therefore, the court's reference to the possibility that Green's unlawful conduct indicated a lack of responsible attitude toward work for McDonnell constitutes merely a suggestion as to the possible relevance of that conduct to the disputed question of the real motivation behind McDonnell's refusal to hire Green. The modified opinion—as distinguished from that which had been superseded—does *not* require McDonnell to prove that Green's participation in the "stall-in" was job-related. What the opinion does require is that the "stall-in" must not have been mere pretext, and it imposes upon Green the burden of showing that McDonnell's stated reasons were in fact pretextual or otherwise tainted by racial discrimination.[12]

The court's modified opinion does not hinge on the application of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as petitioners mistakenly urge. The original panel opinion may indeed appear to reflect a *Griggs* analysis, to which Judge Johnsen's original dissent objected strenuously. The revised opinion, however, takes

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qualified the Act to prohibit employer practices based *solely* on sex, race, national origin or religion, 110 Cong. Rec. 2728 (1964). And it was pointed out by Senator Case, one of the floor leaders supporting Title VII in the Senate, that such an amendment would have emasculated the Act. 110 Cong. Rec. 13,825 (1964).

[12]The modified opinion of the Court contains significant changes on this point which show that the Court was at pains to leave the burden of proof with *Green*. Cf. n. 13 below.

account of those objections and clearly indicates that the *Griggs* citation was merely supportive of the majority's reasoning, but by no means [fundamental] to it.[13]

[13]The original decision, after citing *Griggs*, stated:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that . . . the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. Here McDonnell has not demonstrated . . . that Green's participation in the "stall-in" would impede his ability to perform the job for which he applied.
>
> * * * * *
>
> If McDonnell can demonstrate that Green's participation in the "stall-in" in some objective way reflects adversely on job performance, McDonnell's refusal to rehire Green will be justified. 463 F.2d at 344.

This is *Griggs* language, *cf.* 401 U.S. at 431-432, 436.

In the revised opinion, this language is substantially modified to read:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.
>
> . . . [T]he employer selected two [reasons], the "lock in" and the "stall in", as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.

This is not *Griggs* language, but simply the ordinary treatment due any civil rights claim. Judge Johnsen's characterization of the original opinion as "predicated" on the passage quoted from *Griggs* is inapplicable to the opinion under scrutiny here. Petitioner's argument on this point is similarly off-target and directed against a non-existent holding.

The Court of Appeals was therefore doing nothing more than making sure that the District Court did not read into the broad prohibition of racial discrimination in Section 703(a) an exception that treated those who had engaged in conduct not protected under Section 704(a) as a special class of pariahs, forever to be denied protection against racial discrimination at the hands of the employer demonstrated against.[14]

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[14]The National Labor Relations Act cases cited at pp. 31-33 of Petitioner's brief have no bearing on the instant case. Refusal to hire based entirely on legitimate, non-discriminatory, reasons is permitted under both statutes, and there is nothing in the decision of the Court of Appeals in the instant case to suggest any departure from that principle. To the extent that NLRA cases disqualify from relief persons who have engaged in wrongful or illegal conduct toward their employers, they are based on interpretations of provisions of Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. §160(c), which authorize only "such affirmative action . . . as will effectuate the purposes of this Act." There is no comparable grant of discretion in Title VII to base a refusal of relief upon some prior misconduct on the part of a victim of discrimination; so long as the requirements of Section 706(g) of the Act (42 U.S.C. §2000-5(g)) are met and the reason for the employment decision was in whole or in part racial or other forbidden types of discrimination, the victim is clearly accorded a cause of action.

In this regard the two statutes are not similar, in either language or purpose. Unlike the National Labor Relations Act, the purpose underlying Title VII is not to assure industrial peace by preserving the right of employees to organize and engage in collective bargaining with their employers; instead, the Civil Rights Act of 1964 creates absolute statutory rights that have been assigned by Congress the "highest of priorities." *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Jenkins v. United Gas Co.*, 400 F.2d 28 (5th Cir. 1968); *Rosen v. Public Service Gas & Electric Co.*, 409 F.2d 775 (3d Cir. 1969). Manifestly, the standards articulated under the NLRA can provide only minimal guidance for protections afforded under Title VII. Cf. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969); *Flowers v. International Local No. 6*, 431 F.2d 205 (7th Cir. 1970).

The Opinion Below Does Not Require Preferential Treatment for Blacks

Petitioner's attempts to find in the opinion of the Court of Appeals—and specifically in the reference to "a black man" demonstrating qualification for a job—as mandating preferential treatment for blacks, are specious. As pointed out in the analysis of the opinion of the Court of Appeals in our Statement of the Case (p. 22, supra), the court's comments would apply equally to any claim of illegal employment discrimination, whether the victim were black or white.

III.

THERE ARE ALTERNATIVE GROUNDS UPON WHICH THIS COURT SHOULD AFFIRM THE EIGHTH CIRCUIT'S SUGGESTIONS TO THE DISTRICT COURT.

As noted throughout this brief, the Court of Appeals reversed the district court's order which struck plaintiff's claims based on §703. Petitioner did not appeal this decision, which conforms with decisions of other circuits. In remanding the case to the district court, the Court of Appeals suggested guidelines which the district court should apply in deciding the §703 issue. The Court of Appeals suggested:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. (463 F.2d at 353).

It is this suggested guideline from which petitioner appeals. For the reasons stated in the first two arguments of this brief, we believe this Court should affirm the decision.

However, the record contains additional alternative bases for affirmance. This record suggests a pattern and practice of racial discrimination in employment by McDonnell, and specifically suggests racial discrimination in employment against Percy Green during his employment with the Company.

In spite of the severe limitations placed on discovery and the striking of the §703 claim, respondent's attorney was able to obtain evidence indicating that Green was the victim of racial discrimination when he was discouraged from seeking transfer to the research department because of the threat of layoff and a white employee subsequently made the move and was promoted to a higher classification (Leo Jeffress, A. 68).[15] When Green was afforded the opportunity to move to this department, where he was the only black among 100 men, he was denied a tour of the department as well as a training period, which had regularly been afforded to the white employees.

When the selection of employees was made for layoff it is highly suspect that McDonnell drew the line of initial layoff over the name of Green. It is even more indicative of racial discrimination that McDonnell retained fourteen men below Green on the totem pole; and discouraged Green from transferring to Cape Kennedy in view of the

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[15]Green's work record is demonstrated in part by the Exhibits incorporated in Volume II of the Appendix. As late as March 6, 1964 his ratings by supervisors were average to above average (Pl. Exh. 5, A. 535). His performance record was rated as average (Pl. Exh. 2, A. 515). He had been given "secret" security clearance (Pl. Exh. 4, A. 522). His attendance record was highly satisfactory. His only absence from work was precipitated by his mother's illness (A. 71). He had taken 16 training courses commencing in October, 1956 to January, 1964 (Pl. Exh. 32, A. 565).

retention of all employees at Cape Kennedy. Finally, it is highly suggestive of discrimination that McDonnell requested Green to take an examination for transfer and then retained two whites who failed the test and one who was not asked to take it.

We do not suggest that this evidence of discrimination is sufficient to control the outcome of Green's §703 claims; and respondent's counsel expects to make a much more compelling showing of discrimination when given a proper opportunity to make discovery. However the evidence would justify this Court's affirming the decision below on the alternative ground that one persents a *prima facie* case by showing a history of racial discrimination or discrimination against a particular black applicant coupled with a showing that this qualified applicant was denied a job which remains open.

CONCLUSION

There is no error in the judgment or opinion of the Court of Appeals. They are in accordance with the language and purposes of the statute, as well as with the decision of this Court and lower courts. The judgment of the Court of Appeals should therefore be affirmed. McDonnell's true remedy is to prove its contentions at trial under these proper standards, not to seek here to upset the Court of Appeals' careful decision.

While counsel for respondent would of course prefer an affirmance on the merits, we feel obliged to invite the Court's attention to the fact that the "Questions Presented" in the Petition for Certiorari (p. 2) and in Petitioner's brief on the merits (p. 2) raise theoretical issues that bear no relationship to the decision of the court below. Similarly, the text of the Petition, and much

of that Petitioner's Brief on the merits, are based on a misunderstanding of the decision of the court below or on portions of its majority opinion that had been deleted when the opinion was modified. To rule on the imaginary issues raised by Petitioner would therefore be to render an advisory opinion on a hypothetical case. This Court may therefore wish to consider whether it would be appropriate to dismiss the writ as improvidently granted.

Respectfully submitted,

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Of Counsel:

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APPENDIX A

COMPLAINT OF EMPLOYMENT DISCRIMINATION UNDER 1964 CIVIL RIGHTS LAW

RE: HIRING

TO: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FRANKLIN D. ROOSEVELT, JR.
WASHINGTON, D.C.

complainant: Percy H. Green
3402 LaSalle Street
Saint Louis 4, Missouri

Discrimination was practiced because of my race and because of my persistent involvement in the Civil Rights movement, by McDONNELL AIRCRAFT CORPORATION, BERKELY, MISSOURI.

Sunday, July 25, 2965 [sic] a McDonnell Aircraft advertisement appeared in the St. Louis Post Dispatch–Help Wanted section requesting Mechanics Electric and Radio–Grades 2 or 3, for Immediate Employment.

On Monday morning, July 26, 1965 at 8:15 A.M. I was given an application and directed to Room 226 to complete same. In Room 226, were 18 white persons, of which 5 were white women, all filling applications. I became the only Negro present. Before completing my application 2 Negro men, 1 Negro woman and 6 white men joined the group.

At 8:55 A.M. I returned the completed application form to the receptionist at a desk in the waiting room and was told to have a seat.

At 9:35 A.M. it became apparent that a Negro detective had been detailed to observe me, from a door and

window near where I had found a seat. I know this detective, from past observance, I don't know his name, but I can identify him.

At 10:45 A.M. nearly an hour and a half, after I had returned my completed application, I was called to the employment window and was told by N. Johnson, Jr. Badge Number 104151, QUOTE–"Thank you very much for submitting your application to McDonnell and if we can find a place we can use you–we will call you." UNQUOTE. I questioned this answer, stating that I didn't fully understand–as I was over qualified for the position to which I was making application, as I had previously worked for McDonnell for eight years in this and advanced jobs, and pointed out that the advertisement stated applicants were need for IMMEDIATE EMPLOYMENT. I further requested to speak with the Superior Officer of the Employment Division for further clarification of the dispensation of my application. This request, of course, was at first, ignored, and upon insistence, flatly refused; and, Mr. Johnson, Jr. in finality, stated, QUOTE–"I'm sorry I'll have to ask you to leave. I have other people to talk to." UNQUOTE. It was obvious while talking with Mr. Johnson that he was apprehensive and nervous and had received orders as to what to say to me from higher authority.

I pointed out the lapse in time as one and one half hours, after completing my application to the time I was called by Mr. Johnson, because I departed the premises at 10:57 A.M. and left, at that time with persons who had arrived at the Employment Office 45 minutes after I arrived.

I declare that the general pattern of discrimination employed in my specific application to McDonnell

Aircraft Corporation is the same kind used against the general Negro public, but perhaps not as overtly.

For further remarks and follow-up regarding the peculiar actions around my application for employment at McDonnell Aircraft Corporation you may contact Miss Betti Ruffin, 4553 Anderson, St. Louis, Mo. who was present during the entire episode.

_____

Percy H. Green

Subscribed to and sworn before me this _____ day of _____ 1965.

_____

(Seal and Signature Notary Public)

My commission expires _____

Exhibit E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

NOTICE OF RIGHT TO SUE
WITHIN 30 DAYS

Certified Mail
Return Receipt Requested

MAR 19, 1968

In Reply Refer to:
Case No. 5-7-18
McDonnell Aircraft Corporation
St. Louis, Missouri

Mr. Percy H. Green
3119 Lawton Place
St. Louis, Missouri

Dear Mr. Green:

This is to advise you that conciliation efforts in the above matter have failed to achieve voluntary compliance with Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(e) of the Act, you are hereby notified that you may, within thirty (30) days of the receipt of letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need assistance, you may take this letter, along with the Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the

Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

Sincerely yours,

Robert L. Randolph /s/

Robert L. Randolph (Acting)
Director of Compliance

Exhibit "C"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Percy H. Green — Case No. 5-7-18

Charging Party

vs.

McDonnell Aircraft Corporation
St. Louis, Missouri

Respondent

Date of alleged violation: July 26, 1965
Date of filing: September 14, 1965
Date of service of charge: August 1, 1966

DECISION

SUMMARY OF CHARGE

The Charging Party, a Negro, alleges that Respondent discriminated against him because of race and his persistent involvement in the civil rights movement in the community by refusing to hire him on July 26, 1965. He alleges that he responded to Respondent's ad for Mechanics, Electric and Radio, for "immediate employment" and completed the necessary applications, that he was told he would be called "if we can find a place for you," and that he waited a period of six weeks without hearing from Respondent.

SUMMARY OF INVESTIGATION

Respondent is an employer within the meaning of the Act and is engaged in a business affecting commerce. The corporation is a prime government contractor engaged in the manufacture of aircraft and aerospace vehicles for all

SUMMARY OF INVESTIGATION (continued)

branches of the U.S. Military Services, Federal Aviation Agency, and several N.A.T.O. powers.

Charging Party is a former employee of McDonnell Aircraft Corporation. He was hired by Respondent on August 27, 1956, and worked as an electric and radio mechanic for seven years. At the time he was laid off due to a reduction in force, the Charging Party was classified as a research and development technician.

In September 1965, Charging Party filed charges of discrimination because of race and his participation in civil rights activities with the Missouri Commission on Human Rights, the Department of Labor, and the Equal Employment Opportunity Commission. The complaint to the Department of Labor was investigated by the Department of Navy and the investigation was closed June 13, 1966. The investigation by the Missouri Commission on Human Rights was pending at the time of this investigation. On January 19, 1966, the Charging Party was advised that the Commission had deferred the charge to the Missouri Commission on Human Rights and that that initial deferral had expired. On February 4, 1966, Charging Party requested the Equal Employment Opportunity Commission to assert jurisdiction.

The investigator attempted to serve the charge on August 1, 1966. The company representatives, the Director of Personnel, the Manager of Personnel Services, and Respondent's Attorney, refused to receipt the charge for the stated reason that they could see no reason for again accepting service and being investigated. Further, Respondent challenged the validity of the charges since

SUMMARY OF INVESTIGATION (continued)

they were identical to the charges previously served upon the company by the Missouri Commission on Human Rights and the Navy Department. The Director of Personnel stated that McDonnell's stand has not changed one iota from that reported to the Navy.

Respondent's representatives admitted that the Charging Party was well qualified for the position for which he applied, but reaffirmed that under no circumstances would the Charging Party be rehired. They denied that Green had been refused employment because of race and cited statistics on the number of Negroes employed by Respondent to substantiate their position. The Director of Personnel stated that a person such as Green would not be hired now or ever by McDonnell, as he would have a disruptive influence on other employees and undermine the present harmonious atmosphere within the plant.

The investigation reveals that the Charging Party was very active in civil rights matters during his employment. He demonstrated against the discriminatory employment patterns of those constructing the "Arch" which was being constructed in St. Louis as a part of a National Park commemorating the Settling of the West. As a result of the incident, the Charging Party was questioned by two members of the Personnel Department who indicated a concern as to the effect of Charging Party's activities on McDonnell Aircraft. Charging Party denied that any adverse reaction would accrue to McDonnell Aircraft since neither the police nor the press had been told where the Charging Party was employed. Charging Party stressed that he would not lose any time from his job due to his activities.

SUMMARY OF INVESTIGATION (continued)

Subsequent to the time of the "Arch" demonstration, the Charging Party engaged in numerous demonstrations protesting the employment plight of minority groups. On July 2, 1965, Charging Party as Chairman of ACTION sent a demand letter to McDonnell Aircraft Corporation. The letter demanded an end to "overt discriminatory practices in hiring, upgrading, and layoff" and demanded 3,400 jobs for Negroes. Copies of the letter were sent to Messrs. F.D. Roosevelt, Jr., former Chairman of the Commission, and Frank Karsten, and U.S. Attorney Fitzgibbons. ACTION demonstrated against other companies in the St. Louis area.

Although Respondent denies that Charging Party's involvement in civil rights activities was the reason for rejecting his application for employment, a specific finding of the prior investigative report prepared by the U.S. Navy was that civil rights activity was a factor in Respondent's refusal to accept Charging Party's application. In addition to protecting an individual's rights against an employer for failure or refusal to hire because of race, color, religion, sex, or national origin, Section 704 of Title VII of the Act protects the individual's right to be free of intimidation, coercion, and reprisals because he has opposed discriminatory employment practices. There is no doubt that Respondent considered the Charging Party an undesirable employee because of his civil rights activity and used that as a basis for refusing to rehire him.

SUMMARY OF INVESTIGATION (continued)

DECISION

Reasonable cause exists to believe that Respondent violated Section 704(a) of the Civil Rights Act of 1964 by refusing to accept the Charging Party for employment because of his involvement in civil rights activities.

For the Commission

(signed Marie D. Wilson)
Marie D. Wilson
Secretary

Date May 8, 1967

GREEN v. McDONNELL DOUGLAS CORPORATION
Cite as 463 F.2d 337 (1972)

Percy H. GREEN, Plaintiff-Appellant,

v.

McDONNELL DOUGLAS CORPORATION, Defendant-Appellee.

No. 20596.

United States Court of Appeals,
Eighth Circuit.
March 30, 1972.

Rehearing and Rehearing En Banc
Denied May 12, 1972.

Rehearing Denied June 28, 1972.

* * * * *

[338] Before JOHNSEN, LAY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Percy Green, a black citizen, brought this action against McDonnell-Douglas Corporation (McDonnell) under Title VII[1] of the Civil Rights Act of 1964, seeking relief from the latter's allegedly discriminatory conduct in denying Green employment in July 1965. Green also pressed a claim that McDonnell had discharged him from a job in August 1964 for reasons of race in violation of 42 U.S.C. §1981. The district court denied Green any

[1] 42 U.S.C. §2000e et seq.

relief. Green v. McDonnell-Douglas Corporation, 318 F. Supp. 846 (E.D. Mo. 1970). Green prosecutes this timely appeal. For the reasons stated below, we reverse and remand this case for further proceedings.

To place this controversy in an appropriate frame of reference, we find it necessary to examine chronologically both the underlying facts and the procedures followed in the district court. Although the immediate controversy springs from the refusal of McDonnell to employ Green on July 26, 1965, its origin lies in an earlier employment relationship. In [339] 1956, McDonnell employed Green as a mechanic. He remained with the company continuously, except for twenty-one months of honorable military service, until he was laid off on August 28, 1964. Initially, Green's job was protected by union security, but in 1963 he transferred to a non-union position as a laboratory technician, performing work on research projects in the Electronic Equipment Division of McDonnell. In 1964, the workload decreased in the Electronic Equipment Division, and the company laid off several persons, including Green.

Green, a long-time activist in the movement to obtain equal rights for black citizens, vigorously protested his discharge as being racially motivated. He also filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights. As a member of CORE, and later as a member of ACTION, another civil rights organization, Green, in late 1964 and during 1965, participated in several demonstrations which were staged to call attention to McDonnell's allegedly discriminatory employment practices. These demonstrations included picketing the home of James F. McDonnell,

Chairman of the Board of McDonnell; blocking a main highway access route leading to the McDonnell plant during a traffic "stall-in"; and, participating in a civil rights demonstration during which the doors of a downtown St. Louis building which housed certain McDonnell employees were locked with chains by some of the demonstrators.

On July 25, 1965, McDonnell ran an advertisement in the St. Louis, Missouri, newspapers seeking qualified electrical mechanics. The next day Green applied for one of these positions, but McDonnell, although still seeking qualified mechanics, refused to hire him. McDonnell never has disputed Green's technical ability to perform the work required in that position. Thereafter, on September 14, 1965, Green filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), alleging that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." On May 8, 1967, the EEOC determined that reasonable cause existed to believe that McDonnell had violated 42 U.S.C. §2000e–3(a) by refusing to employ Green "because of his involvement in civil rights activities."[2] It made no determination on the allegation of racial bias.

The EEOC unsuccessfully attempted to conciliate the dispute. Accordingly, on March 19, 1968, it issued a thirty-day letter notifying Green that he might institute civil action in federal court pursuant to 42 U.S.C. §2000e–5(e). This litigation followed.

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[2]The EEOC abstained from taking action in deference to the Missouri Commission on Human Rights, *see* 42 U.S.C. §2000e-5(c), until February 4, 1966, when Green requested the EEOC to assert jurisdiction.

In a complaint filed April 15, 1968, Green alleged that McDonnell had discriminated against him by denying him employment "because of his involvement in civil rights activities." On March 20, 1969, Green filed an amended complaint alleging that McDonnell also had discriminated against him by denying him employment "because of his race and color." Upon motion of McDonnell, the district court struck this additional claim on the ground that the EEOC had made no finding as to reasonable cause on this claim. Green v. McDonnell-Douglas Corp., 299 F. Supp. 1100 (E.D. Mo. 1969).

Although 42 U.S.C. §1981[3] was not specifically mentioned in any of the pleadings, Green, during trial and in [340] post-trial briefs, construed the pleadings to assert that his 1964 layoff was motivated by racial prejudice in violation of that statute.

The district court rejected Green's claim that McDonnell denied him employment in 1965 because of his participation in protected civil rights activities. The court also rejected the 1964 layoff claim brought under §1981. It summarized its conclusions as follows:

(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.

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[3]Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right to every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Plaintiff's layoff claim under 42 U.S.C. §1981 is barred by the statute of limitations.

(c) The Civil Rights Act does not protect activity which blocks entrance into or from an employer's plant or office.

(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire. [318 F. Supp. 851]

On this appeal, Green raises the following contentions:

(1) The trial court erred in dismissing his claim under 42 U.S.C. §1981 for relief from his allegedly unlawful layoff.

(2) The trial court erred in determining that his participation in the "lock-in" and "stall-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a).

(3) The trial court erred in striking the allegations of the complaint which charged McDonnell with denying him employment for reasons of race.

I.

[1] We turn first to the issues relating to the 1964 layoff. Several circuits, following the rationale of Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186; 20 L.Ed.2d 1189 (1968), have concluded that 42 U.S.C. §1981 affords a remedy in federal court for private discrimination in employment. Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, United Order of American Bricklayers and

Stone Masons Local 21, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970). This court has not yet passed upon this question. We find it unnecessary to do so here since, even if we assume that such an action will lie, the action in this case would be barred by the applicable statute of limitations.

[2] Although §1981 contains no limitation period, an action for deprivation of civil rights brought under a federal statute such as §1981 is governed by the most analogous state statute of limitations. *See* Glassco v. Howell, 431 F.2d 863, 864 (8th Cir. 1970); Waters v. Wisconsin Steel Works of International Harvester Co., *supra*, 427 F.2d at 488. In this case, the parties agree that Missouri's five-year limitation period for contracts[4] is the most analogous period of limitation. Within that limitation period, Green filed no pleading which mentioned either the 1964 layoff or 42 U.S.C. §1981.

On August 24, 1970, several months after the trial court had heard the evidence, and more than five years after the 1964 layoff, Green moved under Fed. R. Civ. P. 15(b) to amend his complaint to charge discrimination in "violation of 42 U.S.C. §1981 in that it was based on race, color, and civil rights activities." The trial court denied leave to amend. The record discloses that McDonnell did not expressly or impliedly consent to any [341] action under §1981, and that any evidence relating to the 1964 lay off was introduced as a background for Green's claim to relief from McDonnell's refusal to hire him in July 1965.

Green contends that his amended complaint, which was filed within the limitation period, should be con-

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[4] Mo. Ann. Stat. §516.120(1) (1952).

strued to state a claim under §1981 for discrimination in the 1964 layoff. We cannot accept his broad reading of the language contained in the amended complaint. Although that complaint alleges discrimination "because of... race and color," it specifically refers to unlawful employment practices occurring on "July 26, 1965, and thereafter." This language convinces us that the amended complaint was not intended to encompass the 1964 layoff. Accordingly, we conclude that the district court properly dismissed the layoff claim.

II.

We now examine Green's contention that the district court erred in ruling that his participation in the "stall-in" and "lock-in" demonstrations did not fall within the protection of 42 U.S.C. §2000e-3(a). We confine our discussion here to the question whether Green's participation in the "stall-in" is a protected activity under §2000e-3(a). The record does not support the trial court's conclusion that Green "actively cooperated" in chaining the doors of the downtown St. Louis building during the "lock-in" demonstration. *See* Judge Lay's concurring opinion, *infra*. We therefore measure the protection afforded by §2000e-3(a) against Green's admitted participation in the "stall-in."

Section 2000e-3(a), as pertinent, reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In support of his protection argument, Green stresses the language forbidding discrimination "because [an applicant] has opposed any practice made an unlawful employment practice by this subchapter." According to Green, since the "stall-in" was a non-violent protest designed to call attention to McDonnell's allegedly discriminatory practices, this activity commands the protection of §2000-3(a). McDonnell, on the other hand, asserts that the unlawfulness of this protest removes it from the protection of that section.

[3] We find little relevant authority for either position. The legislative history of Title VII provides us with no guidance as to the scope of the protection afforded by §2000e-3(a), and the small body of case law surrounding that section contains little discussion on the subject.[5] Nevetheless, we think it is clear from the language of the statute that Congress sought to protect employees and job applicants from employer retaliation for filing complaints to the EEOC. Those who have the courage to challenge disoriminatory practices of an employer merit that protection. Without doubt, lawful protest also commands the same protection, but we find no suggestion that protection extends to activities which run afoul of the law. Accordingly, we agree with the district court that the "stall-in" demonstration was not a protected activity under §2000e-3(a).

[5] As support for his position, Green cites passages from Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). In that case, the Fifth Circuit held that §2000e-3(a) prohibits an employer from discharging an employee who makes false statements in a complaint to the EEOC. Although the opinion characterized the protection of §2000e-3(a) as broader than the analogous protection afforded an employee under the Fair Labor Standards Act, 29 U.S.C. §215(a) (3), and under the National Labor Relations Act, 29 U.S.C. §158(a) (4), the court did not attempt to define the parameters of §2000e-3(a).

III.

[342] We find merit in Green's contention that the district court erred in striking the allegation that McDonnell denied him employment in July 1965 "because of his race and color." Such discriminatory practices are prohibited by 42 U.S.C. §2000e-2(a)(1), which provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

[4] As noted above, the district court struck this allegation on the gound that the EEOC had made no finding of reasonable cause. Although the enforcement provisions of Title VII are silent as to the necessity of such a finding, it is now well settled that a complaining party need satisfy only two jurisdictional prerequisites in order to bring suit against an employer under Title VII: first, he must file a complaint with the EEOC; and second, he must receive the statutory notice of the right to sue. *See* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local No. 6, Laborers International Union of North America, 431 F.2d 205 (7th Cir. 1970); Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970); Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). Moreover, four circuits have squarely held that an EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit. Robinson v. Lorillard Corp., *supra*;

Beverly v. Lone Star Lead Construction Corp., *supra*; Flowers v. Local No. 6, Laborers International Union of North America, *supra*; Fekete v. U.S. Steel Corp., *supra*.

[5] In this proceeding, Green satisfied the established prerequisites to a Title VII suit. His formal complaint to the EEOC stated that McDonnell had discriminated against him "because of [his] race and because of [his] persistent involvement in the Civil Rights Movement." We hold that Green was entitled to judicial review of all grounds of employment discrimination alleged in his complaint to the EEOC, and that the district court's ruling to the contrary was erroneous.

IV.

In anticipation of an adverse ruling on this issue, McDonnell argues that Green sustained no prejudice from the trial court's erroneous ruling because the trial court actually considered the racial discrimination claim and ruled against Green on the merits. Therefore, the argument continues, the district court's decision should be affirmed despite this erroneous ruling.

We cannot accept McDonnell's suggestion that it should prevail on an issue that Green was not privileged to present. We cannot say that the district court's action in striking the racial discrimination claim did not hamper the preparation and presentation of Green's case, notwithstanding the commendable zeal displayed by his counsel in producing an abundant record of events and circumstances relating to Green's employment relationship with McDonnell. Additionally, as discussed in part V below, the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job. Instead, the

district court simply assumed that, since the "lock-in" and "stall-in" protests were unprotected activities, McDonnell's refusal to rehire Green could not be violative of 42 U.S.C. §2000e-2(a)(1). The district court said:

> It must be remembered that so far as the Civil Rights Act goes, the employer may discharge or refuse to reemploy for any reason, except discrimination or because of practices made [343] unlawful under Title VII. The testimony and evidence before the court fails to establish by its greater weight, or preponderance, that defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activites. It seems clear from the record that defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the "stall in" and the "lock in" demonstrations. The burden of proving other reasons was on the plaintiff. [318 F. Supp. at 850]

[6] We think it is clear that an applicant for employment may be entitled to the protection of §2000e-2(a) (1) even though he participates in activities which fall outside the protection of §2000e-3(a). These statutes apply to wholly different facets of the employment relationship. Section 2000e-3(a) serves peripherally in the scheme of Title VII to shield an employee or applicant from employer retaliation. Section 2000e-2(a)(1) expresses Title VII's primary promise—equal employment opportunities for all. It would be antithetical to the remedial purposes of the Act to interrelate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside §2000e-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by §2000e-2(a)(1).

In the light of this record, we deem it necessary to remand this case to the district court for reconsideration of the racial discrimination issue in accordance with the standards discussed below. On remand, the parties should be permitted to present such additional evidence as may be relevant to the issue.

V.

[352] The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. Upon that hypothesis, and apparently because the pleadings did not require McDonnell to defend the charge that its refusal to rehire Green was racially motivated, McDonnell rested its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him.

[7, 8] Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. *See* Moore v. Board of Education of Chidester School District No. 59, Chidester, Ark., 448 F.2d 709 (8th Cir. 1971). *See also* Carter v. Gallagher, 452 F.2d 315 (8th Cir., 1971). We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). In enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory

commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination. Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (8th Cir. 1971). Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him. In this case, it is undisputed that Green possessed the requisite skills to perform the work for which he applied, and that McDonnell was seeking qualified applicants at the time it refused to hire him and continued to seek qualified appli-[353] cants thereafter. Moreover, Green's prior performance with McDonnell had earned him a "satisfactory" rating.

[9] When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.

Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the "lock-in" and the "stall-in," as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual,[6] or otherwise show the presence of racially

[6] McDonnell advanced an unsupported charge that Green had "actively cooperated" in the "lock-in." *See* Judge Lay's concurring opinion, *infra*.

discriminatory hiring practices by McDonnell which affected its decision.

The district court did not use appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated. On remand, both parties will have the opportunity to present evidence on this matter.

The amount of lost earnings claimed by Green is not great,[7] but the parties regard this as an important case and have devoted substantial time and energy to its litigation. Although the litigation is still not completed, we deem it appropriate to allow appellant a reasonable attorney's fee for this appeal, to be taxed as costs, upon counsel's submission of an estimate of his fee containing details of his services and time spent on this appeal. *See* 42 U.S.C. §2000e-5(k).

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[7]The record shows that Green obtained reasonably equivalent employment subsequent to July 26, 1965, the date when McDonnell refused to rehire him. Under these circumstances, the district court may limit relief, if any is to be given, to damages based on Green's loss of earnings between July 26, 1965, and the date on which he acquired reasonably equivalent employment, which loss Green estimated to be between four and five thousand dollars.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-490

MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

PERCY GREEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals is reported at 463 F. 2d 337 (Pet. App. A-1 to A-38). The opinion of the district court is reported at 318 F. Supp. 846 (Pet. App. A-40 to A-49).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1972. On petition for rehearing, judgment was re-entered with a revised opinion on May 12, 1972. A second petition for rehearing and a petition for rehearing *en banc* were denied on June 28, 1972. The petition for a writ of certiorari was filed on Sep-

tember 23, 1972, and granted on December 4, 1972. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly stated the principles pertaining to the order and nature of proof which the district court should observe in trying respondent's claim of employment discrimination.

STATUTES INVOLVED

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), in pertinent part provides:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–3(a), in pertinent part provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter * * *.

INTEREST OF THE UNITED STATES

Pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, 42 U.S.C. 2000e *et seq.*, the Department of Justice and the Equal Employment Opportunity Commission are responsible for the administra-

tion and enforcement of federal statutory prohibitions against discrimination in employment on account of race, color, religion, sex or national origin. This case raises a question concerning the order and nature of proof in employment discrimination actions brought under Title VII. The Court's resolution of this question in the context of this private suit may affect federal administration and enforcement of the Act.

STATEMENT

Respondent, a black, was "active and publicly involved in civil rights activities * * * [during] the early 1960's" (Pet. App. A–41). In 1964, he was dismissed from employment with petitioner in the course of a general reduction in petitioner's work force (Pet. App. A–2, A–43). After his discharge, respondent participated in an illegal protest directed against petitioner's allegedly racially discriminatory employment practices; this protest, which consisted of temporarily blocking the access roads to petitioner's plant (a "stall-in"), resulted in respondent's arrest and conviction for the minor offense of obstructing traffic, for which he was fined fifty dollars (Pet. App. A–2 to A–3, A–22, A–43 to A–44).[1] Subsequently, in July 1965, petitioner advertised that jobs were available for mechanics, respondent's trade, and respondent ap-

[1] The district court also found that respondent participated in the illegal chaining of the door of a building in which certain of petitioner's employees worked (a "lock-in") (Pet. App. A–44, A–48), but the court of appeals rejected this finding as not supported by the record (Pet. App. A–7).

plied to petitioner for re-employment (Pet. App. A–3). Although respondent was qualified to fill the advertised position, which remained open, petitioner refused to rehire him (Pet. App. A–3, A–44).

Respondent filed a complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and his involvement in civil rights activities, in violation of Sections 703(a)(1) and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1) and 2000e–3(a) (Pet. App. A–3). The Commission found that there was reasonable cause to believe that petitioner had violated Section 704(a) by refusing to employ respondent because of his civil rights activities; the Commission made no finding with respect to the charge of racial discrimination under Section 703(a)(1) (Pet. App. A–3). In March 1968, the Commission informed respondent that conciliation efforts had failed to achieve petitioner's voluntary compliance with the Act and advised him of his right to sue (Resp. Br. App. 4a to 5a).

Respondent then brought this action, claiming violations of both provisions (Pet. App. A–3 to A–4).[2] The district court dismissed the claim of racial discrimination under Section 703(a)(1), on the ground that a

[2] The original complaint alleged only a violation of Section 704(a); the complaint was subsequently amended to add an allegation under Section 703(a)(1) (Pet. App. A–3 to A–4). Respondent also contested the legality of his original discharge from employment, but both courts below held this claim barred by the statute of limitations (Pet. App. A–5 to A–6, A–45).

Commission determination of reasonable cause to believe a violation had been committed was a prerequisite to the filing of a private action (Pet. App. A–4). After a bench trial, the district court found that petitioner had refused to hire respondent because of his participation in illegal protests and not because of his involvement in legitimate civil rights activities (Pet. App. A–49) and held that such protests are not protected by Section 704(a) (Pet. App. A–47 to A–48). Respondent's complaint was therefore dismissed (Pet. App. A–49).

The court of appeals affirmed the dismissal of respondent's claim that the refusal to rehire him was based on his involvement in civil rights activities, in violation of Section 704(a) (Pet. App. A–6 to A–8).[3] But the court reversed the dismissal of respondent's Section 703(a)(1) claim relating to racially discriminatory employment practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite (Pet. App. A–8 to A–9).[4] The court ordered the case remanded for trial of that issue (Pet. App. A–11).

In remanding, the court of appeals stated some principles pertaining to the order and nature of proof which it believed should govern the trial of respond-

[3] Respondent has not sought review of this issue.

[4] The court was unanimous in its holding with respect to jurisdiction. However Judge Johnsen dissented from the reversal on the ground that since evidence pertaining to alleged racial discrimination had been introduced at trial, the issue had in fact been tried and decided against respondent (Pet. App. A–9 to A–11, A–27 to A–29).

ent's claims.[5] The court's statements on this point seem to contemplate the following procedure: (a) respondent, by showing that he was a member of a racial minority who was qualified for the job for which petitioner had sought applicants and for which he had applied, that he had been refused employment, and that the position had remained open, would present a *prima facie* case of racial discrimination; (b) in rebutting this case, petitioner could show that the refusal to hire was based on respondent's past participation in unlawful conduct against petitioner—the court observed that such conduct "might indicate the * * * lack of a responsible attitude toward performing work for [petitioner]" (Pet. App. A–32)—but any showing of merely "subjective, rather than objective, [hiring] criteria [would] carry little weight" (Pet. App. A–31); (c) once petitioner had furnished reasons for its hiring decision, respondent "should be given the opportunity to show that these reasons * * * were pretextual, or otherwise show the presence of racially discriminatory hiring practices * * * which affected [petitioner's] decision" (Pet. App. A–32 to A–33; footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals correctly reversed the dismissal of respondent's claim that petitioner had engaged in a racially discriminatory employment practice in violation of Section 703(a)(1).

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[5] The court's initial opinion with respect to the order and nature of proof (Pet. App. A–11 to A–14) was superseded by a revised opinion (Pet. App. A–31 to A–33). Only the revised opinion is discussed here.

a. As petitioner acknowledges, the court of appeals followed "a significant trend of decisional law" (Br. 11) in ruling that a Commission finding of reasonable cause is not a jurisdictional prerequisite to suit under Title VII of the Civil Rights Act of 1964. See *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (C.A. 4); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (C.A. 5); *Flowers* v. *Local No. 6, Laborers International Union of North America*, 431 F. 2d 205 (C.A. 7); *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3). Respondent satisfied the requirements of the statute by filing timely charges with the Commission, raising the alleged violation of Section 703(a)(1). See 42 U.S.C. 2000e-5(a). Once the Commission had advised respondent that it was unable to achieve petitioner's voluntary compliance, he was entitled to bring an action based on the charges filed with the Commission. See 42 U.S.C. 2000e-5(e). The Act does not restrict a complainant's right to sue merely to those charges which the Commission has found substantial, and petitioner apparently no longer contends otherwise.[6]

b. The district court's dismissal of respondent's claims of racial discrimination was not harmless error. In the court of appeals, petitioner contended that even if the dismissal of that claim had been technically incorrect, since the district court had permitted the introduction of evidence pertaining to

[6] Petitioner does not argue in either its petition or its brief that the district court lacked jurisdiction to hear respondent's claim of racial discrimination under Section 703(a)(1).

alleged racial discrimination, the claim had in fact been tried and resolved adversely to respondent.[7] It is clear, however, that the claim was not tried. The district court did not discuss respondent's claim of racial discrimination in its opinion and it denied requests for discovery of statistical materials and other information relevant to that claim (see, *e.g.*, App. 11–25, 232–234). Since the district court did not treat the claim of racial discrimination as being before it, and for that reason barred discovery of relevant and possibly probative evidence, the factual issues pertaining to that claim remain undecided; those factual issues should, of course, be initially passed upon by the district court.[8]

2. The only other issue in this case relates to the correctness, not of the judgment below, but of the

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[7] It is not clear whether petitioner has abandoned this contention. Petitioner does not address the issue of harmless error expressly in either its petition or its brief, but its request that the judgment below be vacated and the cause remanded to the court of appeals with instructions that the judgment of the district court be affirmed (Br. 40) implies that respondent's claim of racial discrimination may be determined by this Court without further trial proceedings.

[8] In contending that this Court may determine respondent's claim without further trial proceedings (see n. 7, *supra*), petitioner relies upon the district court's finding that petitioner refused to rehire respondent because of his participation in illegal protests and not because of his involvement in legitimate civil rights activities. But this finding, which was made only in the context of respondent's Section 704(a) claim, leaves open, for example, the questions whether whites involved in similar protests, if any, were also refused employment and whether petitioner's refusal to rehire respondent actually conformed to a general pattern of disfavoring blacks. See pp. 11–14, *infra*.

appellate court's statement of principles pertaining to the order and nature of proof which should govern the trial of respondent's claim of racial discrimination.* As we explain in detail below, the court's guidelines for the proceedings on remand are suitable for trial of the remaining issues in this case, in light of the particular contentions and offers of proof previously made by the parties.

ARGUMENT

THE PRINCIPLES PERTAINING TO THE ORDER AND NATURE OF PROOF SET FORTH BY THE COURT OF APPEALS ARE PROPER FOR THE TRIAL OF RESPONDENT'S CLAIM OF RACIAL DISCRIMINATION

1. As we read the opinion below, the court of appeals described the order and nature of proof which would govern the trial of respondent's claim of racial discrimination in the following terms: (a) by showing that he was a member of a racial minority who was qualified for the job for which petitioner had sought applicants and for which he had applied, that he had been refused employment, and that the position had remained open, respondent would establish a *prima facie* case of discrimination; (b) in rebuttal, petitioner could show its reasons for refusing to hire respondent, such as his past participation in unlawful conduct against petitioner, but any showing of merely subjective hiring criteria would have little probative value; (c) respondent would then be given an opportunity to show that the reasons given by petitioner

*Petitioner's argument in its petition and brief is confined almost exclusively to this aspect of the case.

for its refusal to rehire were merely pretexts or that the decision was in fact based on or improperly affected by racial criteria. We discuss each of these three phases of proof in turn.

a. In describing respondent's initial burden of proof, the court of appeals stated (Pet. App. A–32):

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination.

This statement with respect to the presentation of a *prima facie* case merely indicates the point at which the burden would shift to petitioner to come forward with a valid reason for its refusal to hire.

With the additions to be discussed in this paragraph (and perhaps intended by the court of appeals to be implicit in its formulation), we agree with this view of what constitutes a minimal *prima facie* case in a private, single-plaintiff action challenging employment discrimination. Such a plaintiff (who, unlike the plaintiffs in a class action, is concerned only with his own job) should not be required to meet an initial burden of proof extending beyond the facts of the rejection of his own application for employment. If such a plaintiff shows (1) that he belongs to a racial minority, (2) that he applied for a job for which the defendant was seeking applicants with his qualifications, (3) that he was refused employment without any apparent or stated objective reason for his rejection, and (4) that the employer continued to look elsewhere to fill the position with a person of his qualifications, it is then appropriate to look to the employer to come

forward with an explanation for its rejection of the qualified minority applicant, since whether the defendant had a nondiscriminatory reason for rejecting the applicant would ordinarily be a matter within its own, and not the applicant's, peculiar knowledge. If the employer then fails to come forward with a nondiscriminatory reason for rejecting the applicant, that fact, together with the showing made by the applicant, would, in our view, constitute an adequate basis to permit, although not to compel, the trier of fact to draw an inference of discrimination.[10]

In the present case, however, the issue of the question of proof required for a *prima facie* case is not before this court. For even if a more affirmative showing of discrimination were deemed necessary in private, non-class actions before the burden of coming forward would shift to the employer, in the circumstances of this case the standard stated by the court of appeals adequately guides the district court as to the proper order of proof upon remand. The court's statements with respect to the initial showing to be required of respondent should be read in the context of the proofs and contentions already made in the case: the court was aware that petitioner had in fact come forward with an objective reason—respondent's prior illegal

[10] A more affirmative showing of discrimination is required in class actions and in enforcement suits charging a pattern of discrimination. Cf. *United States* v. *Hayes International Corp.*, 456 F. 2d 112 (C.A. 5); *Bing* v. *Roadway Express, Inc.*, 444 F. 2d 687 (C.A. 5). And the use of statistics of employment and other documentary proofs can of course substantially strengthen the plaintiff's case in a private non-class action. See, *e.g.*, *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954.

conduct—for refusing to hire respondent."[11] The court therefore anticipated that on remand in this case the respondent would be required to do substantially more than present "a *prima facie* case" in order to establish that petitioner's employment practices are racially discriminatory; respondent would be required "to show that these reasons offered by [petitioner] were pretextual, or otherwise show the presence of racially discriminatory hiring practices * * *" (Pet. App. A–32 to A–33; footnote omitted). Thus, when read as a whole and in its factual context, the court of appeals' opinion does not purport to set forth a "*prima facie* case" standard for all employment discrimination cases under Title VII, or even for all non-class actions brought by individual plaintiffs. The court was merely describing the showings that have so far been made, and those that remain to be made, in this particular case.

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[11] Although the court indicated that respondent's unlawful conduct "might indicate [his] lack of a responsible attitude toward performing work for [petitioner]" (Pet. App. A–32), the court properly avoided determining whether that conduct, viewed alone, would justify petitioner's refusal to rehire respondent. That question, which petitioner seeks to raise here (Br. 19–34), should not be considered in the first instance by a reviewing court. It is for the trial court, and not a reviewing court, initially to determine—in light of all the evidence, including the kind of evidence relating to racial discrimination which respondent was precluded from introducing at the first trial—whether petitioner's claimed ground for refusing to hire respondent is a mere pretext and, if not, whether when that ground is viewed, not alone, but in connection with all other relevant facts, a racially discriminatory purpose is nevertheless revealed.

b. The court of appeals stated in effect that although petitioner presumably would again come forward with objective criteria, such as prior unlawful conduct directed against petitioner, for refusing to rehire respondent, any evidence of merely subjective criteria would "carry little weight" (Pet. App. A–31). Contrary to petitioner's contention (Br. 34–39), this is a proper description of the worth of evidence concerning purely subjective hiring criteria in Title VII cases. In the context of this case, in which petitioner has already come forward with an objective reason, we read the court's statement merely as putting petitioner on notice that if respondent were to show that petitioner's alleged practice of excluding from employment persons who have been involved in illegal protests in fact has a significant racially discriminatory impact, petitioner would then be required to justify that practice on the basis of business necessity, rather than on subjective grounds alone. Employment practices which have been shown to have a substantial discriminatory impact may not be sustained merely by proof of good faith or of an absence of discriminatory intent. As this Court pointed out in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation". See, also, *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (C.A. 5). An employer may justify a practice having a substantial discriminatory impact only by showing that the practice is needed because

of considerations of safety, efficiency, or other necessities of the business. *Griggs* v. *Duke Power Co., supra; Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (C.A. 2). Whether the business necessity issue will arise at all in this case, however, remains to be determined on the basis of respondent's proof at trial.

c. The court below concluded that respondent should on remand be given an opportunity to show that the reasons given by petitioner for its refusal to rehire him were merely pretexts or that the decision was in fact based on or improperly affected by racial criteria. For the reasons discussed above, we believe this statement (along with other aspects of the opinion previously discussed) constitutes a fair summary of the present status of the case and of the burden of proof which respondent now carries.[12]

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[12] Although petitioner, erroneously in our view, contends that further trial proceedings are unnecessary (see notes 7 and 8, *supra*), we do not read petitioner's brief as suggesting that respondent should have no opportunity to show that the reasons given by petitioner were pretextual or based on or improperly

2. As we have shown (pp. 6–8, *supra*), the judgment of the court of appeals, reversing the dismissal of respondent's claim of racial discrimination under Section 703(a)(1), was, in our view, correct. The issues petitioner seeks to raise here—the requirements of a *prima facie* case, the proper weight to be accorded subjective evidence as to motivation, and whether petitioner's refusal to rehire respondent was in fact justified—do not appear ripe for review by this Court in the circumstances and present posture of this case.[13]

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affected by racial criteria. Petitioner's contention apparently is only that respondent has already been afforded that opportunity; petitioner seems to have no quarrel with the substance of the appellate court's description of the showing required of respondent.

[13] Indeed, only one of petitioner's contentions—that its refusal to rehire respondent was justified—calls into question the correctness of the judgment below. And that contention, as we have explained (pp. 7–8, *supra*), asks this Court to resolve factual matters which have not yet been fully tried.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed or, in the alternative, this Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF[1]

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Although respondent's "Statement of the Case" is more in the nature of an argument than an accurate portrayal

[1] The United States had informally indicated to petitioner's counsel that it intended to file a brief *amicus curiae* in this case but refused to state when such a brief would be filed or to discuss its substance or tenor, even generally. On March 19, 1973, eight days before oral argument and the date upon which the instant reply was required to be submitted to the printer, petitioner received page-proof copies of the government's memorandum. Peti-

Cont'd.

of actual occurrences, we do not deem it appropriate or necessary to engage in a line-by-line refutation of respondent's version of the facts. Several of respondent's contentions, however, cannot pass unnoticed.

One particularly erroneous assertion appears at page 12 of Respondent's Brief where he states that "it was not shown, however, that Green had *known about* or participated in the plan to chain the building." To the contrary, the undisputed evidence established that Green, as leader of the group, was told by one of his subordinates that he was planning to chain the front door of the Roberts Building and that Green approved that proposal (A. 132-33).

Respondent asserts at pages 17-18 that the issue of racial discrimination was not tried by consent, although at pages 36-37 he refers to the evidence offered on that subject as creating a *prima facie* case of discrimination. In addition to the abundance of "racial" evidence referred to at pp. 12-13 of our main brief, the record shows that counsel for McDonnell stated the issue being tried as whether Green "was refused employment allegedly because of discriminatory reasons" (A. 55). And counsel for Green repeatedly made reference to the "discrimination that occurred in 1965" (A. 56), and fully briefed and argued the issue of race. The District Court opinion examined in detail Green's evidence of discrimination (318

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tioner has not had an adequate opportunity to analyze the memorandum, and this reply is accordingly directed solely to respondent's brief. We would observe, however, that the participation of seven members of the Department of Justice and four attorneys from the EEOC (not to mention the five distinguished practitioners who appear as "counsel" to respondent) belies the government's assertion that this case involves nothing more than "the order and nature of proof" in one isolated claim of discrimination. The Court of Appeals' rules are substantive in nature and are expressed in terms applicable to virtually all Title VII cases.

F. Supp. at 847) and rejected respondent's suggested inferences.

Respondent also complains that he was denied timely access to statistics of the racial composition of McDonnell's work force with the result that he was foreclosed from effectively cross-examining petitioner's witnesses (Br. 13). This contention is without merit. Respondent originally sought, in effect, access to all of McDonnell's employment records covering an eight-year period (A. 11, 18). When this oppressive demand was denied, respondent did not seek any other statistical data from petitioner, and the racial statistics supplied by McDonnell to the government were never requested (A. 458-64). Nonetheless, at trial Green did have access to thirteen pages of statistical racial information[2] supplied by his witness, Peter Robertson, which no doubt explains his failure to request such information from McDonnell. And, contrary to the statement in his brief (Br. 13), he cross-examined McDonnell's witnesses Windsor (A. 409-10) and Krone (A. 465-68) at length on the basis of those same statistics.

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[2] Contrary to respondent's assertions, these statistics are not at all indicative of any discrimination.

ARGUMENT

I. Respondent's Interpretation of the Court of Appeals' Opinion Is Implausible and Inconsistent With His Previous Position, and Respondent Has Tacitly Conceded the Errors of Which Petitioner Complains.

Respondent has evidently despaired of any attempt to justify the holding of the Court of Appeals but instead contends that the majority opinion below doesn't really mean what it appears to say. Although respondent characterizes the prevailing Eighth Circuit opinion as "careful" (Br. 37), he himself seems to have encountered severe difficulty in arriving at any consistent interpretation of that holding. Although we agree with respondent that the opinion below, as we read it and as respondent has previously construed it, is unduly strained, we suggest that respondent's disclaimer of the opinion's meaning and import is disingenuous.

Respondent's brief makes no attempt to answer petitioner's argument on the several critical issues presented by this case but, rather, he asserts:

(1) That the Court of Appeals did not shift the burden of proof to the employer upon proof of a Title VII claimant's race and qualifications;

(2) That the Court of Appeals did not rely on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and did not require petitioner to establish the stall-in's job relatedness;

(3) That no preferential rules were created for minority job applicants; and

(4) That the Court did not purport to restrict either the admissibility or the weight to be accorded to subjective evidence of the employer's motivation.

As we read the opinion below, respondent's characterization of the Eighth Circuit's holding is legally and linguistically without foundation. Certainly it is contrary to the interpretation of the dissenting judge and of respondent himself in his Brief in Opposition to our Petition for Certiorari.[3] *At best*, the state of the law has been hopelessly confused by the opinion below and should be clarified by this Court. We will discuss respondent's contentions as to the meaning of the majority opinion below *seriatim*.

1. The Court of Appeals plainly held that a *prima facie* case of discrimination is made by a black man upon proof of his qualifications to fill an open job. The obvious result flowing from this statement is that the employer is guilty of discrimination if he fails to come forward to rebut the *prima facie* showing. In discussing the effect and impact of a *prima facie* rule, the court in *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F. 2d 818, 822 (5th Cir. 1972), stated:

> "In discrimination cases the law with respect to burden of proof is well-settled. The plaintiff is re-

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[3] A further indication of the construction being accorded to the Eighth Circuit's opinion in a broad range of contexts can be gleaned from a brief recently filed in *Gossin v. Huskey*, No. 72-1558, currently pending in the Eighth Circuit, a case in which respondent's present counsel represented the plaintiff in the district court and has appeared as co-counsel for the appellant in the Court of Appeals. In appellant's brief, the judgment entered by the district court in favor of the defendant-employer is criticized, at page 31, because, *inter alia*, "there is no objective evidence" supporting the employer's position. At page 34, the decision here for review is summarized as follows:

> "Green v. McDonnell Douglas Corporation, supra, holds that a black person makes out a *prima facie* case of impermissibly biased treatment when he demonstrates that he was qualified for the job denied him. The burden then shifts to the employer to demonstrate that its failure to hire or rehire was based upon bona fide objectively-ascertained, non-pretextual, non-discriminatory, reasonable and not arbitrary conduct and criteria."

quired only to make out a *prima facie* case of unlawful discrimination *at which point the burden shifts to the defendant* to justify the existence of any disparities. See, e.g. Norris v. Alabama, 294 U.S. 587. . . . Once the plaintiff has made out his *prima facie* case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would exonerate him." (Emphasis supplied.)

Respondent apparently concedes the impropriety of imposing the burden upon the employer, as we find no defense of the Court of Appeals' holding in Respondent's Brief, but merely a statement that we have misconstrued what the majority said or meant. The inconsistency of respondent's evaluation of the opinion below is evidenced by his own Brief in Opposition to the Petition for Writ of Certiorari filed in this case. There, at page 5, in summarizing the holdings of the Court of Appeals, he stated that:

> ". . . once a *prima facie* showing of racial discrimination has thus been made the burden shifts to the employer to prove the constitutional and statutory bona fides of its refusal to hire."[4]

2. Equally artificial are respondent's suggestions that the Court of Appeals did not rely upon *Griggs v. Duke Power Co.* and did not hold that petitioner's reasons for rejecting Green's application must be job-related.

Although the modified majority opinion made some deletions, it still contains two specific *Griggs*-like state-

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[4] If in fact mere "qualification" for a job creates a *prima facie* case of discrimination, such "qualification" should have a broader meaning than that which has been utilized in this case, *i.e.* mere technical and physical ability to perform the work. It should also include freedom from personality traits and past conduct which would indisputably offend the sensibilities of ordinary people. It should encompass not only the ability to perform the job but also the willingness to do so loyally.

ments requiring an appraisal of job-relatedness.[5] The revised opinion also includes a direct quote from *Griggs*: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited." 463 F. 2d at 352. In addition, the concurring opinion, adhered to following the modification of the majority view (463 F. 2d at 352), specifically purports to restate the majority opinion as holding that the employer must prove "that the reason for the rejection is objectively related to job performance." 463 F. 2d at 346.

At the time of the filing of his Brief in Opposition, respondent apparently had a different understanding of the significance of the job-related requirement and of the reliance of the Court of Appeals upon *Griggs*. In formulating his version of the question presented by this case, respondent, at page 5, stated:

> "The question presented is whether the Court of Appeals improperly interpreted anti-discrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a *prima facie* showing of bias, than will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity."

And contrary to the assertion in his brief on the merits (Br. 24) that the Court of Appeals "neither squarely relied on nor squarely had to rely on *Griggs v. Duke Power Co.*," respondent's Brief in Opposition, stated that the majority opinion "flow[ed] directly from this Court's opinion in *Griggs*."

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[5] See footnote 13 to petitioner's main brief.

Respondent's approach to this issue constitutes a concession that this case is not measurable with a *Griggs* yardstick and that no showing of job-relatedness is either necessary or appropriate.

3. In response to petitioner's argument that the *"prima facie"* test of the Court of Appeals creates, in effect, reverse discrimination in favor of minority applicants, respondent attempts to ameliorate the manifest unfairness and illogic of such a rule by contending rather lamely that the court referred to "a black man" only because of the facts of this case (Br. 22, 35).

To avoid admitting the resulting favoritism, respondent states that a *prima facie* case would also be made by a qualified white person in similar circumstances. Apparently respondent would attempt to convince this Court that anyone who "claims" racial discrimination can avail himself of the Eighth Circuit's *prima facie* rule. The problems with respondent's approach are manifold. The mere color of an applicant's skin proves nothing, nor does his *assertion* of racial discrimination.[6] He must point to some factor that permits some inference that he was treated differently *because of* his color. Moreover, respondent's interpretation clearly shifts the burden of proof to the employer almost from the outset, despite his transparent disclaimer of any intention to do so.

Respondent, recognizing the weakness of his construction of the appellate court decision and anticipating the consequences of his disavowal of its rationale, contends alternatively that he made a *prima facie* case nonetheless because of his previous work record at McDonnell (Br. 35-37). The trouble with this assertion, however, is that

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[6] Under the NLRA, it has consistently been held that the mere fact of a discharged employee's union membership does not create any inference of anti-union animus. See *e.g. N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 398 F. 2d 640 (5th Cir. 1968); *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874 (8th Cir. 1965).

his claims of discrimination during his prior employment were rejected by the trial court. The Court of Appeals did not set aside any of these findings, but respondent appears to be asking this Court to retry these factual issues anew.

Finally, even assuming a *prima facie* case was made, McDonnell clearly rebutted it and showed ample justification for its refusal to hire Green.[7]

4. Respondent's preoccupation with semantics has caused him to miss the mark with his contention that the Court of Appeals' "objective-subjective" rules do not limit or disparage the type of evidence which may be offered but are referable only to the permissible criteria for making employment decisions (Br. 26-29). The initial problem resulting from the "objective-subjective" issue is that such concepts have no relevance whatsoever to the instant case, and the Court of Appeals' attempt to discuss this action in terms of subjectivity or objectivity is simply erroneous and productive of misunderstanding.

The original majority opinion held that McDonnell would be required to make proof of its motivation "in some objective way" (463 F. 2d at 344), and the revised majority opinion continued to criticize at length "subjectively-based hiring decisions." The upshot of this language was summarized in Judge Johnsen's supplemental dissent, 463 F. 2d 355:

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[7] Respondent contends that he made a *prima facie* case for reasons other than those considered by the Eighth Circuit, and that he is therefore entitled to an affirmance of the judgment of the Court of Appeals. Such a contention, besides ignoring McDonnell's rebuttal of Green's evidence, is also erroneous because even if this Court determines that another trial should be had, such a trial should be conducted in accordance with proper standards enunciated by this Court for this and other Title VII cases. Under those circumstances, the judgment of the Court of Appeals would have to be vacated inasmuch as it has remanded the case to the District Court "for further proceedings consistent with the majority opinion" (A. 47).

> "Any proof that would be possible in attempting to show that Green would be an industrial handicap to the operation of the plant would necessarily involve opinion or subjective testimony which, as pointed out in my original dissent, the majority opinion declares to be of 'little weight in rebutting charges of discrimination.'"

Respondent contends that the Court of Appeals merely held that "subjective criteria" are less persuasive than objective criteria. In the context of this case, however, the majority opinion appears to instruct the District Court to disregard any of McDonnell's subjective evidence as to its reasons for refusing employment to Green because of their "pretextual" propensities and their frequent utilization as a "cloak" for racial discrimination. The effect of the Court of Appeals' holding is that in a refusal-to-hire case the employer must be able to identify some definitive standard or policy, uniformly and regularly applied, which disqualifies the individual applicant. Any other non-objective reasons for rejecting his application are suspect and infirm and are entitled to no credence. Hence, any "subjective" testimony as to hiring decisions which is not directed to and measured by pre-existing "standards" is, according to the Court of Appeals, forbidden or at least "pretextual."

As pointed out in our principal brief, the interjection of "objective-subjective" concepts into an individual refusal-to-hire context is totally unwarranted and inevitably confusing. This is particularly true in the case at bar because, whether one's reaction to Green's activities is denominated "subjective" or "objective," it is a revulsion universally experienced by law-abiding people. This is not a case where unidentifiable factors might have been used to mask racial prejudice, but is rather an instance where the respondent is attempting to invoke rules designed for

other situations in order to excuse conduct calculated to offend everyone.

Respondent cites several authorities concerned with promotion and transfer, and seniority and testing, where current practices served to perpetuate the effects of prior rampant discrimination. All of the cases relied on by Green were class actions or government pattern-and-practice suits, and none of them held that a job applicant can recover under Title VII merely because his rejection was based on subjective reactions. Furthermore, "objective" observations may be available where the employee has been performing his job for awhile and can be compared to fellow employees for, *e.g.*, promotion, transfer or layoff purposes. But such considerations are singularly inappropriate to a refusal to hire, and particularly to one based on unprotected and illegal misconduct.

II. Since the District Court Applied the Correct Standards and Reached an Inescapable Conclusion, Its Judgment Should Be Reinstated.

Respondent, though tacitly conceding error by the Court of Appeals on the primary questions presented to this Court, nevertheless contends that he should be entitled to another trial because of the district court's original ruling striking allegations of racial discrimination from the amended complaint. Petitioner firmly believes that the trial court's reading of the Act was correct, but that issue is not before this Court. Petitioner, however, has never conceded that any error in that ruling was prejudicial to respondent, and the record affirmatively demonstrates a lack of prejudice. This Court must thus determine what disposition to make of this case. In *Grand Chute v. Winegar*, 15 Wall. 355, 369 (1872), the Court noted the absence of prejudice

resulting from the erroneous striking of a defense and thus refused to order a new trial:

> "Indeed it is evident that although the plea was technically excluded, no evidence was rejected on account of its absence, but that the defendant litigated every question of fact as far and as fully as it would have done if this pleading had remained."

See also *Nemaha County v. Frank*, 120 U.S. 41, 45 (1887); *Chambers County v. Clews*, 21 Wall. 317 (1874).

Respondent contends that the Eighth Circuit's reversal on the race discrimination question is not before this Court because the matter of "harmless error" was not specifically set forth in the "Questions Presented." The question of the effect of the Court's striking of allegations of racial discrimination is hardly of such magnitude of itself to warrant the exercise of this Court's certiorari power, and thus was not enumerated separately in our Petition for Certiorari as one of the important Questions Presented. It is, however, squarely encompassed within Question 1 because the Court of Appeals has held that, on account of respondent's race and his plea of racial discrimination, McDonnell is to be held to a greater task of proof and cannot rest "its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him." 463 F. 2d at 352. Moreover, the ultimate issue posed by this case is whether McDonnell violated the Act by its refusal to hire Green, and since this Court has agreed to review the case, sound principles of judicial husbandry and this Court's inherent supervisory power require a disposition which would be most equitable and just under the circumstances and which would avoid the unnecessary waste of judicial time and energy.

The Eighth Circuit criticized the District Court for applying improper standards to the issues of this case and

ordered a new trial under new rules. We have demonstrated here the inappropriateness of the Eighth Circuit's rules, and it is evident that the District Court was absolutely correct in its evaluation of the testimony and its application of legal principles to the evidence adduced. Respondent seeks a remand to the District Court in order to pursue his discovery, which was previously restricted to proper bounds, and intimates that he might prove his case through statistics. The statistical information sought by Green is in the record, and it is probative of nothing. His assertion that statistics may be highly relevant to this case is mistaken. Although some judges have stated their belief that *in class actions and pattern-and-practice suits*, statistics, if aggravated enough, may even create a *prima facie* case of discrimination, statistical evidence in a case of alleged individual discrimination, "is not determinative of an employer's reason for the action taken against the individual grievant." *Terrell v. Feldstein Company, Inc.*, 468 F. 2d 910, 911 (5th Cir. 1972). In the instant case, the relevant statistics were before the District Court and for obvious reasons were of no utility. Similarly, the District Court examined an extensive record of the treatment accorded to Green during his prior employment and found that his protestations of discrimination were more imagined than real.

Respondent requests another trial for the purpose of again attempting to show that some reason other than the stall-in and lock-in was considered by McDonnell when the decision not to hire him was made. According to Green, the existence of *any* improper consideration—however slight—would tarnish the whole decision and would automatically subject McDonnell to liability (Br. 31, note 11) even though the "stall-in" or "lock-in" would provide more than ample justification for rejection of Green's application. We submit that respondent has inaccurately stated the law and has proposed a test that fails to fur-

ther the purpose of Title VII, which is to proscribe intentional discrimination *on the basis of* race, color, religion, sex or national origin. It is this misconception of the law which has drawn respondent to his belief that a remand would be availing.

As indicated in our main brief, the search in an employment discrimination case is for the employer's *real motive*. Under Title VII, like under the NLRA, this inquiry should crystallize itself into an attempt to determine the employer's *principal, dominant* or *controlling* reason for taking the challenged action.[8] *Rafford v. Randle Eastern Ambulance Service*, 348 F. Supp. 316 (S.D. Fla. 1972); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 430 (D. Utah 1971). This test has received widespread approval under the NLRA when the question presented was whether or not the employer's decision was motivated by anti-union animus. See *e.g. N.L.R.B. v. Brown*, 380 U.S. 278 (1965); *Radio Officers v. N.L.R.B.*, 347 U.S. 17, 43 (1954); *N.L.R.B. v. Fibers International Corp.*, 439 F. 2d 1311 (1st Cir. 1971); *Filler Products, Inc. v. N.L.R.B.*, 376 F. 2d 369 (4th Cir. 1967); *Reading & Bates, Inc. v. N.L.R.B.*, 403 F. 2d 9 (5th Cir. 1968); *Nachman Corp. v. N.L.R.B.*, 337 F. 2d 421 (7th Cir. 1964); *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874 (8th Cir. 1965); *N.L.R.B. v. Local 38*, 388 F.2d 679 (9th Cir. 1968).[9]

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[8] It should be noted in this connection that the District Court, discharging its function as the trier of fact, found the stall-in and lock-in to be the *sole* reasons why Green's application was turned down, an even stronger finding than required. 318 F.Supp. at 850.

[9] Respondent's suggestion that labor act cases "provide only minimal guidance" on Title VII questions is unpersuasive in this context. Both statutes are designed to ban discrimination in employment, and a test widely utilized for the purpose of identifying decisions inspired by anti-union animus would just as effectively serve to spot racially biased acts. See generally, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1259 (1971).

This "dominant motive" test furthers the intendment of Title VII by requiring, as a predicate to recovery, a causal link between the discrimination and the employment decision. Respondent's suggestion that *any* impermissible attitude or factor should illegitimize every employer decision cannot withstand scrutiny. Two examples will illustrate the fallacy of respondent's position:

1. Suppose that the owner of a watchmaking company has openly stated that he dislikes Irishmen. When O'Brien, who is blind, applies for an available job as a watchmaker, he is refused employment. Under respondent's theory, O'Brien could recover under Title VII even though anyone else having O'Brien's disability would also have been rejected. He was not denied employment *because he was Irish.*

2. Suppose that the personnel manager of a company has a record of never having hired a woman, although many job applications have been received from females. Ms. Smith applied for a job two days after she had committed a physical assault upon the president of the company. Even if we assume that the personnel manager harbors a prejudice against women, there could be no realistic contention that such bias was a causative factor in Ms. Smith's failure to gain employment.

In both of the above hypothetical cases and in the case *sub judice,* the rejection of the employment application is a foregone conclusion irrespective of the race, color, religion, sex or national origin of the applicant. Experience teaches us that the disqualifying conduct or characteristic of the applicant far outweighs and renders insignificant any bias which *might otherwise* have played a part in the decision.

To determine, therefore, whether an improper motive controlled the employment decision, the appropriate ques-

tion is whether the applicant would have been hired *but for* his race, color, religion, sex or national origin.[10]

Common sense and the evidence both demonstrate that employers with self-respect do not hire persons who have engaged in unlawful acts against them, whether those persons be black, white or Percy Green; and neither discovery, statistics nor additional trial proceedings will alter this basic fact of life. The rationale which should govern here was incisively stated by Judge Wisdom in a discharge setting in *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F. 2d 617, 621 (5th Cir. 1961);

> "If . . . the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union, since all will understand that the employee would have been fired anyway. It must be remembered that the statute prohibits discrimination, and that the focus on dominant motivation is only a test to reveal whether discrimination has occurred. Discrimination consists in treating like cases differently. If an employer fires a union sympathizer or organizer, a finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently."

The fact that the respondent in this case is black does not in any wise immunize him from the natural and an-

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[10] For applications of such a rule in the labor area, see *Southwest Latex Corp. v. N.L.R.B.*, 426 F. 2d 50, 54-55 (5th Cir. 1970); *Self-Reliance Ukranian American Coop. Ass'n. v. N.L.R.B.*, 461 F. 2d 33, 38 (7th Cir. 1972); *N.L.R.B. v. Ayre Lar. Sanitarium*, 436 F. 2d 45 (9th Cir. 1970); *Nix v. N.L.R.B.*, 418 F. 2d 1001, 1010 (5th Cir. 1969). In *Nix*, the Court stated: "An improper motive must be a cause without which the employee would not have been discharged."

ticipated consequences of his misdeeds, nor should it require McDonnell to endure the futile ritual of yet another trial of his contrived claim. The District Court properly analyzed this case and correctly determined that Green's plea for equitable relief is barred by his unclean hands. This Court should enter the judgment which should have been rendered by the Eighth Circuit by reinstating the judgment of the District Court. *Delk v. St. Louis & San Francisco R.R. Co.*, 220 U.S. 580, 588-89 (1911); *Baker v. Warner*, 231 U.S. 588, 593 (1913); *Gibson v. Lockheed Aircraft Co.*, 350 U.S. 356 (1956).

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McDONNELL DOUGLAS CORP. *v.* GREEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 72-490. Argued March 28, 1973—Decided May 14, 1973

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's re-employment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated § 704 (a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated § 703 (a)(1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by § 704 (a) and dismissed the § 703 (a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the § 704 (a) ruling, but reversed with respect to § 703 (a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. *Held:*

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703 (a)(1) were not identical to those

Syllabus

with respect to § 704 (a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 5–7.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. P. 9.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward minority employees. Pp. 9–13.

463 F. 2d 337, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-490

McDonnell Douglas Corporation, Petitioner, *v.* Percy Green.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May 14, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964.

Petitioner, McDonnell Douglas Corporation, is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964[1] when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated.[2] As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to

[1] His employment during these years was continuous except for 21 months of service in the military.

[2] The Court of Appeals noted that respondent then "filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights." *Green* v. *McDonnell Douglas Corporation*, 463 F. 2d 338, 339 (1972).

petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the "stall-in" as follows:

> ". . . five teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.
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> "Acting under the 'stall in' plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a. m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined." 318 F. Supp. 846, 849.

On July 2, 1965, a "lock-in" took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the "lock-in," the full extent of his involvement remains uncertain.[2]

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[2] The "lock-in" occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which

Some three weeks following the "lock-in," on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in" and "lock-in". Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703 (a)(1) and 704 (a) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-(2)(a)(1) and 2000e-3 (a).[4] The former section generally prohibits racial

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certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION "that he was planning to chain the front door," and that he "approved of" chaining the door, there is no evidence that respondent personally took part in the actual "lock-in" and he was not arrested. App., pp. 132–133.

The Court of Appeals majority, however, found that the record did "not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration." 463 F. 2d, at 341. See also concurring opinion of Judge Lay. *Id.*, at 345. Judge Johnsen, in dissent, agreed with the District Court that the "chaining and padlocking [were] carried out as planned, [and that] Green had in fact given it . . . approval and authorization." 463 F. 2d, at 348.

In view of respondent's admitted participation in the unlawful "stall-in," we find it unnecessary to resolve the contradictory contentions surrounding this "lock-in."

[4] Section 703 (a)(1) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (a)(1), in pertinent part provides:

"It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment,

discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

The Commission made no finding on respondent's allegation of racial bias under § 703 (a)(1), but it did find reasonable cause to believe petitioner had violated § 704 (a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccessfully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704 (a) and, in an amended complaint, a violation of § 703 (a)(1) as well.[8] The District Court dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or § 704 protected "such activity as employed

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because of such individual's race, color, religion, sex, or national origin . . . ."

Section 704 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-3 (a), in pertinent part provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."

[8] Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

by the plaintiff in the 'stall-in' and 'lock-in' demonstrations." 318 F. Supp., at 850.

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under § 704 (a),[6] but reversed the dismissal of respondent's § 703 (a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court ordered the case remanded for trial of respondent's claim under § 703 (a)(1).

In remanding, the Court of Appeals attempted to set forth standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on "subjective" criteria which carried little weight in rebutting charges of discrimination; that though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were merely pretextual.[7] In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, 409 U. S. 1036 (1972).

I

We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit

[6] Respondent has not sought review of this issue.

[7] All references here are to Part V of the revised opinion of the Court of Appeals, 463 F. 2d 352, which superseded Part V of the Court's initial opinion with respect to the order and nature of proof.

under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under § 703 (a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000e–5 (a) and 2000e–5 (e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a "reasonable cause" determination as providing employer immunity from similar charges in a federal court, 29 CFR § 1601.30, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, "court actions under Title VII are *de novo* proceedings and . . . a Commission's 'no reasonable cause' finding does not bar a lawsuit in the case." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 800 (CA4); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (CA5); *Flowers* v. *Local 6, Laborers International Union of North America*, 431 F. 2d 205 (CA7); *Fekete* v. *U. S. Steel Corp.*, 424 F. 2d 331 (CA3).

Petitioner argues, as it did below, that repondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ "was tried thoroughly" in a trial lasting four days with "at least 80%" of the questions relating to the issue of "race."[8] Petitioner therefore requests that the judgment below be vacated and the

[8] Tr. of Oral Arg. p. 11.

cause remanded with instructions that the judgment of the District Court be affirmed.[9] We cannot agree that the dismissal of respondent's § 703 (a)(1) claim was harmless error. It is not clear that the District Court's findings as to respondent's § 704 (a) contentions involved the identical issues raised by his claim under § 703 (a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally important question under the Act of whether, for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the § 703 (a)(1) cause of action was properly before the District Court.[10] Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

II

The critical issue before us concerns the order and allocation of proof in a private, single-plaintiff action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429 (1971); *Castro* v. *Beecher*, 459 F. 2d 725 (CA1 1972); *Chance* v. *Board of Examiners*, 458 F. 2d 1157 (CA2 1972); *Quarles* v. *Philip*

[9] Petitoner's Brief, p. 40.

[10] The trial court did not discuss respondent's § 703 (a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

Morris, Inc., 279 F. Supp. 505 (ED Va. 1968). As noted in *Griggs*, *supra*:

> "Congress did not intend Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any gorup, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 430.

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color."[11] Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participa-

[11] The respondent initially charged petitioner in his complaint filed April 15, 1968 with discrimination because of his "involvement in civil rights activites." Appendix 7, 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of § 703 (a) (1). Appendix 27.

tion in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of the court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.[12] We now address this problem.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13] In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. 463 F. 2d, at 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications[14] and acknowl-

[12] See original opinion of the majority of the panel which heard the case, 463 F. 2d 338; the concurring opinion of Judge Lay, *id.*, p. 344; the first opinion of Judge Johnsen, dissenting in part, *id.*, p. 346; the revised opinion of the majority, *id.*, p. 352; and the supplemental dissent of Judge Johnsen, *id.*, p. 353. A petition for rehearing *en banc* was denied by an evenly divided Court of Appeals.

[13] The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from the complainant in this case is not necessarily applicable in every respect to differing factual situations.

[14] We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements

edges that his past work performance in petitioner's employ was "satisfactory."[15]

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carries little weight in rebutting charges of discrimination," 463 F. 2d, at 352. This was among the statements which caused the dissenting judge to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to rehire him, even though no racial motivation was involved. . . ." 463 F. 2d, at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access and egress to petitioner's plant at a peak traffic hour.[16] Nothing in Title VII compels

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must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used. *Griggs*, *supra*, at 431. *Castro* v. *Beecher*, *supra*; *Chance* v. *Board of Examiners*, *supra*.

[15] Tr. of Oral Arg., p. 3; 463 F. 2d, at 353.

[16] The trial judge noted that no personal injury or property damage resulted from the "stall-in" due "solely to the fact that law

an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.[17] In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

> "We are unable to conclude that Congress intended to compel employees to retain persons in their employ regardless of their unlawful conduct—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, ... Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, 255 (1939).

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703 (a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretextual. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of com-

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enforcement officials had obtained notice in advance of plaintiff's [here respondent's] demonstration and were at the scene to remove plaintiff's car from the highway." 318 F. Supp., at 851.

[17] The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

parable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretextuality includes facts as to the petitioner's treatment of respondent during his prior term of employment, petitioner's reaction, if any, to respondent's legitimate civil rights activities, and petitioner's general policy and practice with respect to minority employment.[18] On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones* v. *Lee Way Motor Freight, Inc.*, 421 F. 2d 245 (CA10 1970); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.*, and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 91–94 (1972).[19] In short, on the retrial respondent must be

[18] We are aware that some of the above factors were indeed considered by the District Judge in finding under § 704 (a), that "defendant's [here petitioner's] reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall-in' and 'lock-in' demonstration." 318 F. Supp., at 850. We do not intimate that this finding must be overturned after consideration on remand of respondent's § 703 (a)(1) claim. We do, however, insist that respondent under § 703 (a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

[19] The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, *supra*, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence

given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

The court below appeared to rely upon *Griggs* v. *Duke Power Co.*, *supra*, in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*, at 431.[10] But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *Id.*, at 430. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretextual or discriminatory

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of an otherwise justifiable reason for refusing to rehire. See generally, *United States* v. *Bethlehem Steel Corporation*, 312 F. Supp. 977, 992 (WDNY 1970), aff'd, 446 F. 2d 652 (CA2 1971). Blumrosen, *supra*, at 93.

[10] See 463 F. 2d, at 352.

application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barrier to employment" which the Court found to be the intention of Congress to remove. *Griggs*, p. 431.[21]

III

In sum, respondent should have been allowed to amend his complaint to include a claim under § 703 (a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was pretextual or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The judgment is vacated and the cause is hereby remanded to the District Court for further proceedings consistent with this opinion.

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[21] It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." 463 F. 2d 353. But in this case, given the seriousness and harmful potential of respondent's participation in the "stall-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." *Garner v. Los Angeles Board*, 341 U. S. 716, 720 (1951).